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BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR  
AGENCY ACTION OF UTAH CHAPTER OF  
THE SIERRA CLUB, SOUTHERN UTAH  
WILDERNESS ALLIANCE, NATURAL  
RESOURCES DEFENSE COUNSEL, AND  
NATIONAL PARKS CONSERVATION ASSOCIATION,  
PETITIONERS; DIVISION OF OIL, GAS AND  
MINING, RESPONDENT -- REQUEST FOR BOARD  
REVIEW OF THE DIVISION'S OCTOBER 19, 2009,  
APPROVAL OF THE APPLICATION OF ALTON COAL  
DEVELOPMENT, LLC, TO CONDUCT SURFACE COAL  
MINING AND RECLAMATION OPERATIONS IN COAL  
HOLLOW, KANE COUNTY, UTAH.

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DOCKET NO. 2009-019 CAUSE NO. C/025/0005

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TAKEN AT: Department of Natural Resources  
1594 West North Temple, Room 1040  
Salt Lake City, Utah

DATE: Wednesday, December 9, 2009

TIME: 3:00 p.m. TO 7:21 p.m.

REPORTED BY: Michelle Mallonee, RPR

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## APPEARANCES

## BOARD OF OIL, GAS AND MINING:

Douglas E. Johnson, Chairman  
James T. Jensen  
Ruland J. Gill, Jr.  
Jake Y. Harouny  
Kelly Payne  
Samuel C. Quigley (Excused)  
Jean Semborski

## DIVISION OF OIL, GAS AND MINING:

John R. Baza, Director  
Dana Dean, Associate Director, Mining  
Gil Hunt, Associate Director, Oil and Gas  
Steve Schneider, Administrative Policy Coordinator  
Julie Ann Carter, Secretary to the Board  
Marianne Burbidge, Legal Secretary

## ASSISTANT ATTORNEYS GENERAL:

Steven F. Alder - Division Attorney  
Fred Donaldson - Division Attorney  
Michael S. Johnson - Board Attorney  
Stephen Schwendiman - Board Attorney  
Megan Depaulis - Board Attorney

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14 SOUTHERN UTAH WILDERNESS ALLIANCE CONSERVATION DIRECTOR

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FOR THE DIVISION OF OIL, GAS, AND MINING:

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Docket No. 2009-019 Cause No. C/025/0005

Wednesday, December 9, 2009

(The proceedings began at 3:00 P.M. a.m.)

CHAIRMAN JOHNSON: This is Docket No. 2009-019 Cause No. C/025/0005 - In the Matter of the Request for Agency Action of Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Counsel, and National Parks Conservation Association, Petitioners; Division of Oil, Gas and Mining, Respondent -- Request for Board Review of the Division's October 19, 2009, Approval of the Application of Alton Coal Development, LLC, to Conduct Surface Coal Mining and Reclamation Operations in Coal Hollow, Kane County, Utah.

Mr. Bloch, you are representing the petitioner?

MR. BLOCH: Mr. Chairman, I'm here, along with my co-counsel, Mr. Walton Morris.

MR. MORRIS: Good afternoon, Mr. Chairman.

CHAIRMAN JOHNSON: Hello, Mr. Morris. Nice to meet you.

Mr. Alder, you are representing the State?

MR. ALDER: Yes. Steve Alder for the Division along with...

MR. DONALDSON: Fred Donaldson, also with the Division.

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1           CHAIRMAN JOHNSON: And we have an intervening  
2 party, Alton Coal Development. Ms. Dragoo?

3           MS. DRAGOO: Yes. Denise Dragoo representing  
4 Alton Coal Development. And Mr. Bennett Bayer  
5 representing Alton Coal Development. And Jim Allen  
6 representing Alton Coal Development. And we have one  
7 other intervenor here.

8           CHAIRMAN JOHNSON: That was the first item that  
9 we wanted to address. We got a --

10          MR. PAYNE: Mr. Chairman, could I make a comment  
11 before we...

12          CHAIRMAN JOHNSON: All right. Let's have Mr.  
13 Payne make one comment, then we'll move forward.

14          MR. PAYNE: I just wanted to disclose a previous  
15 relationship with one of the possible witnesses for  
16 Alton. I understand that support counsel has informed  
17 all the parties of that relationship. But just wanted to  
18 let it be noted today that I'm going to participate in  
19 the discussions today, but will not be taking --  
20 participating in any of the votes on any of these issues.

21          MR. JOHNSON: Just for the record, do any  
22 parties have any objection, given what they've heard, to  
23 Mr. Payne sitting up here with the Board and potentially  
24 even asking questions if he doesn't vote on any -- on any  
25 votes that might be taken today while you consider the

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1 nature of this conflict.

2 MR. MORRIS: Petitioners do not object.

3 MR. ALDER: The Division doesn't, either.

4 MS. DRAGOO: Respondent does not.

5 MR. BERNARD: William Bernard appearing on  
6 behalf of Kane County, who is entered as an intervenor at  
7 this time, does not object.

8 CHAIRMAN JOHNSON: Okay. That's the first item  
9 that I would like to discuss. We had a request for Kane  
10 County to intervene as a party in this matter.

11 Do any of the other parties have any objections  
12 to the entering of Kane County in this matter?

13 MR. MORRIS: Petitioners do not object.

14 CHAIRMAN JOHNSON: Thank you, Mr. Morris.  
15 Mr. Alder?

16 MR. ALDER: No, we do not.

17 CHAIRMAN JOHNSON: Ms. Dragoo?

18 MS. DRAGOO: Alton Coal welcomes Kane County.

19 CHAIRMAN JOHNSON: Kane County will be entered  
20 as a party.

21 And could you give us your name again, please?

22 MR. BERNARD: William Bernard, B-E-R-N-A-R-D,  
23 Deputy Kane County Attorney. I want to thank SUWA and  
24 Sierra Club for acquiescing to Kane County's entrance as  
25 an intervenor.

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1           CHAIRMAN JOHNSON: Okay. So we have four  
2 parties.

3           Mr. Bayer -- I think we have an outstanding  
4 motion for Mr. Bayer to be recognized pro hac.

5           MR. BAYER: Please. If I could, I'd like to  
6 join in on this.

7           CHAIRMAN JOHNSON: We'd like to have you.

8           MR. BAYER: My pleasure, thank you.

9           CHAIRMAN JOHNSON: Are there any objections from  
10 any of the parties?

11          MR. MORRIS: Absolutely not. Having been  
12 permitted to appear by ACD, we would not object to Mr.  
13 Bayer.

14          MR. ALDER: We'd welcome Mr. Bayer, as well.

15          CHAIRMAN JOHNSON: And Kane County has no  
16 objections?

17          MR. BERNARD: No. Kane County has absolutely no  
18 objections to Mr. Bayer, and would like to make a  
19 statement before the proceedings go too far.

20          CHAIRMAN JOHNSON: Pardon me?

21          MR. BERNARD: Kane County would like to make a  
22 short statement before the matters go too far.

23          Kane County would like to thank the Board for  
24 being allowed to have intervenor status in this, because  
25 the interests involved here are integral to the -- and

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1 very vital to the interests of the persons and citizens  
2 of Kane County.

3 Kane County Commissioner, Doug Heaton,  
4 accompanied me here today so he could at least bring to  
5 the Board some of the visceral facts -- some of the facts  
6 that are vital to the decision-making process. And also  
7 just to enlighten the Board so things could be taken in  
8 context -- context as to the socioeconomic effects, and  
9 enlighten the Board as to some of the statements that are  
10 in Sierra Club's --

11 CHAIRMAN JOHNSON: Okay. We appreciate those  
12 comments. Let's move forward.

13 The Board has issued an order regarding the  
14 scope of today's hearing. There are five items in the  
15 Board Order that we're going to be addressing today. The  
16 motion regarding the scope, I believe, was brought by the  
17 petitioners. Is that correct?

18 MR. MORRIS: That's correct, Mr. Chairman.

19 CHAIRMAN JOHNSON: So I think we'd like to hear  
20 from you first, regarding Item No. 1 on the Board Order,  
21 saying we will hear oral argument on the petition, or the  
22 motion for entry upon the permit area and those parts of  
23 the cumulative impact area that the company controls.

24 Mr. Morris, if you are prepared, would you  
25 please go ahead.



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1           MR. MORRIS: Thank you, Mr. Chairman and Members  
2 of the Board.

3           Inspections requests, such as the one that  
4 petitioners have made in this case, are routinely granted  
5 under Rule 34 of the Utah Rules of Civil Procedure and  
6 the parallel Federal Rules of Civil Procedure. They are  
7 granted for the reasons stated in the case law that  
8 petitioners have cited in their reply memorandum. No  
9 showing of necessity is required to establish good cause  
10 for such an inspection. It is simply a necessary measure  
11 to put counsel and expert witnesses on the same footing  
12 as counsel and expert witnesses for the permit applicant  
13 are on as the result of their unfettered access to the  
14 site. It is unfair to ask an expert witness to testify  
15 regarding particular conditions on premises that the  
16 expert is not allowed to inspect.

17           It is also unfair to ask counsel for a party to  
18 cross-examine experts for a permit applicant, in this  
19 case, or for the Division, who have had access to a site,  
20 without allowing counsel, himself, to go and see what the  
21 conditions are, but the testimony he must cross-examine  
22 is based upon.

23           Inspection is a key to achieving the objectives  
24 that this Board defined in its second order in the Lila  
25 Canyon case, establishing the need for an unfettered

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1     evidentiary hearing in each permitting theme. In that  
2     order, the Board quoted the case of Cordova versus  
3     Blackstock, a supreme court case from this state, as  
4     saying, first of all that, "formal proceedings allow for  
5     the opportunity for fuller discovery and fact finding,  
6     and are more likely to result in an adequate record for  
7     review."

8             The Board went on to quote, again from Cordova,  
9     saying, "In addition to the need to develop a record  
10    adequate for the purposes of judicial appellate review,  
11    courts have recognized that conducting formal evidentiary  
12    hearing is necessary in reviewing informal agency action  
13    because it allows the reviewing tribunal, 'to consider  
14    and act on any deficiencies that might arise by nature of  
15    the informality of the agency hearing.'"

16            As a result in that case, the Board said, "For  
17    these reasons the Board will hold a formal adjudication  
18    in this matter in which it will review, one, the evidence  
19    that was made available to the Division during the permit  
20    review process; and two, other relevant evidence and  
21    information not considered by the Division in order to  
22    make its own findings of fact and conclusions of law  
23    concerning the legal and factual issues which were  
24    involved in the Division's decision."

25            There is no way that -- I submit to you -- that

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1 petitioners can play the role assigned to them by this  
2 holding without, at a minimum, putting their expert and  
3 their counsel on site in a nonintrusive way to conduct a  
4 site inspection that is the ordinary privilege of  
5 litigants under the Utah Rules of Civil Procedure.

6 Now, in its papers filed in opposition, ACD has  
7 identified no interest of its own. It might be impaired  
8 by the requested inspection. They have simply criticized  
9 us as untimely, in an argument that, frankly, has no  
10 support at all in the regulations.

11 The petitioners are under no obligation, prior  
12 to the approval of a permit application, to spend time or  
13 resources investigating a site area that is the object of  
14 an informal conference. They have the right to request  
15 such a visit. But they also have the right, in the law,  
16 to wait until the permit is issued to see if, in fact, it  
17 is issued at all, and then to exercise discovery rights  
18 under this Board's rules.

19 That is what happened in this case. And it is  
20 impossible for this Board to get, from the petitioners, a  
21 competent presentation of all of the scientific facts and  
22 opinions that the Board has a right to look to  
23 petitioners to develop, without allowing their expert and  
24 their counsel on site.

25 Although an inspection now must await the

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1 melting of the current snow cover, any delay that this  
2 fact might cause is not petitioner's responsibility;  
3 frankly, it's ACD's. They have chosen to oppose what is,  
4 in our view, clearly a meritorious request. Had they  
5 chosen not to do that, the site visit would have already  
6 been performed. And the reason that it stands now as a  
7 potential delay to the evidentiary hearing is solely  
8 because ACD chose to fight our request.

9 So in summary, fairness and the Utah Rules of  
10 Civil Procedure fully support -- indeed require, the  
11 granting of the motion that we've made. And I urge you,  
12 Members of the Board, to vote to grant it. Thank you.

13 CHAIRMAN JOHNSON: Mr. Alder?

14 MR. ALDER: Thank you, Mr. Chairman.

15 I have not filed a position on behalf of the  
16 Division with regard to this inspection request, in part  
17 because it appeared that it would be able to be  
18 accomplished. But the weather has changed my mind on  
19 that. Additionally, I think it's a little more important  
20 that I initially had thought.

21 Let me say that, from the Division's point of  
22 view, the most important thing is that this hearing  
23 provides an opportunity for fairness and a complete  
24 examination of the issues that are raised by petitioner,  
25 and protection of the rights of the company to get their

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1 permit. And, as we have argued previously, this is a de  
2 novo hearing which provides this -- more of an  
3 opportunity to hear the witnesses and cross-examine those  
4 witnesses and make their own findings of fact.

5 So I guess my concern, that has ripened a little  
6 bit, is that this matter of an inspection, if it's viewed  
7 in the light of a discovery request, may be ruled and  
8 governed by the Utah Rules of Civil Procedure and the  
9 precedents, and provide an opportunity for reversal by  
10 appellate court if it's not allowed.

11 Having said that, I would say, on the other side  
12 of the argument, that certainly there has been an  
13 opportunity for three years for the petitioners to make  
14 this inspection. They had an express opportunity under  
15 the rules that allow for inspection at the time of the  
16 informal conference. There was no attendance at the  
17 informal conference or request for that inspection which  
18 is allowed for. I think there is some question as to  
19 whether or not the issues that are raised in their  
20 petition really require an inspection.

21 But I guess I speak to this motion just to say  
22 that having said all that, nevertheless, I am concerned  
23 that in the abstract it will be viewed as a matter that  
24 has no prior history. And a party comes before the  
25 Board, as anybody could, at the last minute without

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1 having participated in an informal conference, and ask  
2 for an appeal and ask for an inspection, and having been  
3 denied that, put the decision in jeopardy of some sort.

4 I would suggest and ask leave of the Board to  
5 give -- or to have an opportunity to submit within a week  
6 further research on those issues, because I think it's a  
7 really important issue for this Board at the beginning --  
8 much more so than I thought it was. I apologize for not  
9 briefing it. Thank you.

10 CHAIRMAN JOHNSON: Mr. Bayer?

11 MR. BAYER: Yes, sir, I would like to respond.

12 I think, fundamentally, and from my perspective  
13 as representing the permittee, I would hope that this  
14 Board would not be captured by a notion that what this is  
15 supposed to be is a wide open free-for-all examination  
16 starting from the very beginning of what this permit is  
17 all about.

18 The permit was originally filed in 2004. The  
19 permit application package was submitted. And as each  
20 and every one of you are aware of, this is not a process  
21 that occurs overnight. It took years and years and years  
22 of evaluation. It took many different times where  
23 information was submitted to the Division of Oil, Gas and  
24 Mining. There were times when the permit application was  
25 sent back to Alton for technical corrections. There was

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1 more information that was required.

2 I, myself, having heard for the first time what  
3 was just stated is that the petitioners had no obligation  
4 to invest any time or resources into determining what  
5 would be their chief complaint until after the permit was  
6 to be issued. I find that somewhat offensive, because  
7 the whole premise of what this Board is supposed to  
8 review was put into their petition. It is a summary that  
9 they stated of the summary of the argument, and that is  
10 that, "The Division acted arbitrarily, capriciously, and  
11 contrary to law in failing to withhold approval of ACD's  
12 inaccurate and incomplete permit application, and in  
13 failing to conduct a cumulative hydrologic impact  
14 assessment in accordance with the applicable requirements  
15 of law and good scientific practice."

16 If they can take the position today and come in  
17 and sit before you in good faith and say, Well, we had no  
18 obligation to do anything until just now, then how was it  
19 that they were able to put all the allegations they put  
20 within their petition for review? Each of you had an  
21 opportunity to look at the petition. And the question  
22 is: What is the scope of review that this Board is now  
23 charged with the responsibility to conduct? Is this  
24 supposed to be a wide open trial, or is this more in the  
25 nature of an appellate review?

[16]

1           And there's a couple different decisions,  
2 perhaps, that would define the scope of your review. But  
3 I think before you need to worry about trying to analyze  
4 it from a legal standpoint, all we have to do is look at  
5 it from standpoint of what has the petitioner said.

6           They have come in and very clearly challenged  
7 that the Division did not make an adequate review of the  
8 permit application. And in their petition, there's some  
9 basic points -- there's about 11 different basic points  
10 they have raised. Most of them have to do with hydrology  
11 or information that was or was not included within the  
12 permit review. And I ask you: If we're dealing with a  
13 situation as to whether or not information was or was not  
14 included within the permit application package, why is  
15 there any discovery necessary? And I think that needs to  
16 be a threshold issue that this Board needs to examine.  
17 What is the purpose of discovery if what we're trying to  
18 do is determine whether or not a fact, a piece of  
19 hydrologic data, was included within the permit  
20 application package?

21           The allegation contained within the petition is  
22 that Alton Coal failed to include data within the permit  
23 application package; and therefore, the Division failed  
24 to review this material. Again, "The Division acted  
25 arbitrarily, capriciously, and contrary because of an



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1 incomplete permit application." Incomplete permit  
2 application.

3 Well, the proof that's going to be presented to  
4 you is that all of the data that was supposed to be put  
5 into the permit application was there. And this Board  
6 will be able to determine whether or not under Utah  
7 Regulation, Utah statutory provisions, and whether under  
8 OSM provisions, whether or not the data that was supposed  
9 to be put into that permit application package was  
10 actually contained within the package. If it's there,  
11 it's there. If it's not there, then you will be able to  
12 see. What is the discovery that is necessary to figure  
13 out whether or not that material was put into the  
14 package. That's the underlying fundamental premise of  
15 the petition.

16 But in the request for discovery, and if we look  
17 at the motion for discovery, and they have -- Mr. Morris  
18 has referred to this already today -- they wrote in  
19 paragraph 6, "It is necessary to enable petitioner's  
20 counsel and consultant to develop a reasonably equivalent  
21 familiarity with the subject lands as counsel,  
22 consultants, and scientific employees of the Division and  
23 ACD have developed, or have the unfettered capability to  
24 develop, so that petitioner's counsel may effectively  
25 present petitioner's evidence, formulate

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1 cross-examination of adverse witnesses. The petitioner's  
2 consultant may present his intended testimony in light of  
3 personal observation of the lands in question rather than  
4 solely on the basis of reviewing documents, and to enable  
5 petitioner's consultant to verify or detect error in the  
6 various geological and hydrological data and conclusions  
7 that ACD has submitted that the petition has approved --  
8 that the Division has approved with respect to ACD's  
9 permit application."

10 Mr. Alder has hit upon it succinctly. Where  
11 were they for the three years and more that this permit  
12 was being processed? And if, in fact, their goal is to  
13 enable them to come up to "develop a reasonably  
14 equivalent familiarity with the subject lands as counsel,  
15 consultants, and scientific employees of the Division and  
16 ACD have developed," it's going to take them three years  
17 minimum. And they are going to have to spend millions of  
18 dollars, because that's what Alton has already done. We  
19 have spent millions of dollars to develop this  
20 information. We have hired numerous consultants. And if  
21 they expect, in the course of a site visit over two days,  
22 to acquire any information that's going to be dispositive  
23 over any subject that this Board has to determine, I find  
24 that disingenuous.

25 Let's talk about hydrologic data. Part of their

[19]

1 complaint alleged within the petition is that there  
2 aren't sufficient quarters of hydrologic data included  
3 within the permit application package. You are required  
4 to have eight quarters of hydrologic data. They cannot  
5 acquire eight quarters of hydrologic data on two days  
6 worth of site inspection. And I don't care whether it's  
7 December, January, February, or whatever. They cannot,  
8 in two days of inspection, acquire the same level of  
9 knowledge and familiarity with this permit as either  
10 Alton or the Division. No discovery on earth will give  
11 them that ability, except if they expend the next three  
12 years working on acquiring the same level of knowledge as  
13 the Division and as Alton.

14 Under the Rules of Evidence for Utah, it's very,  
15 very clear. Rule 401 states that something is relevant  
16 "if it tends to prove a fact, by its admission, more than  
17 would be proven if not admitted." Okay.

18 We go back to what is the analysis. What is it  
19 that they're trying to prove? Discovery is allowed under  
20 Utah law for something that is relevant. So what becomes  
21 relevant in the evaluation that you are dealing with now?  
22 It is based upon what is contained within the challenge.  
23 The challenge says the Division didn't act properly in  
24 reviewing the information and that the information isn't  
25 within the permit application package.

[20]

1           This is not broad scope general litigation.  
2       This is not intended to create a trial. This is not  
3       intended to go out and find every possible fact, every  
4       possible nuance that could be considered in whether or  
5       not this site is appropriate for mining, whether or not  
6       this site should be mined, whether or not surface mining  
7       is appropriate. That's not the scope of review for this  
8       Board. The scope of review is limited by what is  
9       actually contained within the petition, the allegations  
10      contained within the petition.

11           They must show good cause to conduct discovery.  
12      The good cause is fairly broad spectrum in Utah. The  
13      question of what is good cause is loosely defined. The  
14      determination of what is good cause depends to a large  
15      extent upon the facts of each case, and a wide latitude  
16      of discretion is allowed this body. But it's got to be  
17      relevant. The Rules of Civil Procedure require discovery  
18      to be relevant. Your rules of evidence we talk about and  
19      require what is relevancy.

20           If they go out and, as requested in their  
21      motion, they want to conduct inspection and measuring,  
22      surveying, photographing, testing, and sampling the  
23      property, I'm sorry, what can they do in two days that is  
24      going to undo three years worth of significant research  
25      and data compilation? I submit to you that there is no

[21]

1 real need for any discovery in a broad scope, as they  
2 might envision.

3 I have no problem with discovery if it's  
4 relevant, if it's on point, and we define what is the  
5 scope of examination and valuation that this Board is  
6 going to conduct. Not until we come to that resolution  
7 can you then define the scope of discovery, because until  
8 you know what are the issues they are presenting, you  
9 don't know what is going to be relevant.

10 Fundamentally, if, in fact, they found  
11 themselves as having no responsibility whatsoever to  
12 acquire any data, to do any research, to do any  
13 evaluation until such time as the permit was issued, then  
14 how did they come up with their allegations that  
15 everything we did was wrong? How did they come up with  
16 the allegations that the Division was wrong? They must  
17 have been doing something. They must have been making  
18 some evaluation over these many years; otherwise, every  
19 allegation they put in their petition is fabricated.

20 All of the documents related to the permit  
21 application package are available online. It's public  
22 record. They've had the opportunity to look at it. They  
23 make specific reference to provisions within the permit  
24 application package. They make specific references to  
25 letters. They make specific references to conversations,

[22]

1 discussions, and emails. Don't let them tell you that  
2 all of a sudden they've been confronted with a permit  
3 that's been issued and this came to them out of the clear  
4 blue. That's not the way it works. Steve Alder made  
5 mention to the fact that they had requested for an  
6 informal hearing, and they didn't attend. Now is not the  
7 time to throw this wide open.

8 The most disingenuous statement I've heard so  
9 far is that Alton is to blame for the snowfall yesterday.  
10 I'm sorry, coming to Utah from Kentucky, I didn't bring  
11 any snow with me. Snow was in the west, I came from the  
12 east, it was moving toward me. That's the next point.

13 In their motion for inspection, they requested  
14 the inspection to occur after the hearing. They wanted  
15 the 10th, the 11th, and the 12th as their days of  
16 inspection. I did not bring the snow with me. Those  
17 were the days that they requested. We didn't cause the  
18 delay. In the motions, they set out the specific dates.  
19 And they said they would rather get it done now, sooner  
20 rather than later for fear of snow covering the area. I  
21 didn't bring the snow.

22 If, in fact, you delay discovery until March,  
23 and then they go out and start taking depositions, and  
24 then they start doing interrogatories, and then they  
25 start doing all these other things associated with

[23]

1 general litigation, I'm telling you, we will be sitting  
2 here a year from today conducting a hearing on whether or  
3 not my client gets their permit, on whether or not the  
4 millions of dollars that Alton Coal has spent over the  
5 years putting the material in the permit application that  
6 they've had access to, needs to be reviewed.

7 I have no problem with discovery. Let's define  
8 the scope of what we're doing here today, and then we can  
9 define the scope of discovery. It should be narrow, it  
10 should be to the point, it should be done quickly,  
11 efficiently and cost effectively for everyone.

12 I need to have a hearing. I have a company that  
13 has been given permission to get a permit, and there's a  
14 challenge. They have the burden of proof to move forward  
15 with their challenge. Thank you.

16 CHAIRMAN JOHNSON: Mr. Bernard.

17 MR. BERNARD: I think there's been an allusion  
18 to, there might be some sort of an appeal if the Board  
19 were not to find in favor of the petitioners. I think  
20 the Board should be aware of the fact that on appeal --  
21 if the petitioners were to appeal, the review -- the  
22 standard of review is going to be abuse of discretion.  
23 So please do not let fear of an appeal affect your  
24 judgment today. The permit should be allowed to stand as  
25 issued. And your decision made earlier, which was a

[24]

1 proper decision, should be sustained.

2 CHAIRMAN JOHNSON: Let's go through this one  
3 more time.

4 Mr. Morris, let's give you an opportunity to  
5 reply to what you've heard. Then we're going to go down  
6 the line again and give everybody a chance to reply,  
7 okay?

8 MR. MORRIS: Thank you, Mr. Chairman.

9 ACD -- first of all, we welcome the Division's  
10 support of our motion. We think it's telling that they  
11 believe that fundamental fairness requires that we be  
12 permitted to conduct the site visit that we've requested.

13 ACD's argument goes beyond the inspection issue.  
14 What Mr. Bennett (sic) has just laid before you is a  
15 challenge to your decision in the Lila II case about the  
16 scope of these hearings. Our entire presentation today  
17 is based upon the understanding that this Board decided  
18 in Lila II how administrative review of permitting  
19 decisions would go in Utah.

20 And based upon the principles from Lila II that  
21 I cited in my opening argument, we have asked for this  
22 first incident of discovery and intend to ask for quite a  
23 bit more, because we see it as our obligation to  
24 supplement the record made before the Division and to use  
25 the full scope of discovery -- not every potential part



[25]

1 of discovery, but the full scope of our discovery rights  
2 as we see best to use them -- to produce the additional  
3 evidence that, frankly, this Board needs if it's going to  
4 make an informed decision on whether or not to issue this  
5 permit.

6 ACD's argument takes our relatively small-framed  
7 motion for a site inspection, which will require only two  
8 or three days and hardly constitutes a broad range use of  
9 discovery, and uses it as a vehicle to attack the notion,  
10 first of all, that the hearing ought to be conducted as  
11 you provided in Lila II; and second of all, that  
12 discovery is a useful device in reaching that goal.

13 Even if we had participated in the informal  
14 conference and if Mr. Lips had gone out and inspected the  
15 site at the time of the informal conference, the fact of  
16 the matter on this record remains that the Division did  
17 not go out and look at the AVF issue and identify for the  
18 record, on the permit record, its critical factors in  
19 reaching its determination of AVF until well after the  
20 informal conference. So had we gone out during the  
21 informal conference, we would still be requesting another  
22 site visit so that Mr. Lips could go back out and take a  
23 look at the issues that the Division had identified and  
24 verify those conditions on the land.

25 Now, Mr. Bayer is correct in saying that we

[26]

1 can't cure the defects in the amount of hydrologic  
2 data -- the deficiencies in the hydrologic data in two or  
3 three days. That's not why we asked for the site visit.  
4 We asked for the site visit primarily for the AVF issues.  
5 But also for other hydrologic issues that are tied to  
6 what an expert sees and measures on the ground.

7 Mr. Lips is entitled to look at the lay of the  
8 land out there, and to take water samples, and to take  
9 nonintrusive samples of soils, or whatever, connected  
10 with the AVF issue, so that he can put himself on an  
11 equal footing with the experts that you will hear from,  
12 from Alton and the Division.

13 You know what the cross-examination of Mr. Lips  
14 will include if he's not allowed to go out there. I'm  
15 certain every attorney for every party, other than the  
16 petitioners, will make the point that Mr. Lips, whatever  
17 he says, has never been on the site and isn't familiar  
18 with the conditions as they're laid out there. That's  
19 just not fair to subject him, or any expert for a  
20 petitioner, to that sort of cross-examination. When they  
21 are, from the very get-go, saying, We need to get out  
22 there. We need to see the site for ourselves.

23 What you have before you in the site inspection  
24 motion is not the broad ranging question of what this  
25 hearing ought to look like or how much total discovery

[27]

1 ought to occur, it's simply whether the site inspection  
2 ought to go forward in the interest of fundamental  
3 fairness to the petitioner's expert and to the  
4 petitioner's counsel.

5 If nothing more, that site inspection is  
6 necessary to allow us to evaluate what is on paper,  
7 having seen the property with our eyes, and being at  
8 least as close as we can reasonably get to the position  
9 of Alton's counsel, the Division's counsel, and their  
10 experts.

11 Will we be able to draw ourselves in the parody?  
12 Absolutely not. They have spent years out there  
13 familiarizing themselves. But it would be unreasonable  
14 for us to ask for the same amount of time to familiarize  
15 ourselves with that. We're not asking for that. We're  
16 asking for an inspection that won't interfere with  
17 anybody doing anything, and we'll take no more than two  
18 or three days. That's simple, fundamental fairness.

19 The test of discovery is not relevance, as ACD's  
20 argument suggests that it is. It is, instead, that  
21 discovery be reasonably calculated to lead to the  
22 discovery of relevant evidence. Going out, taking a look  
23 at the conditions of the land that ACD proposes to  
24 mine -- that is or is not an alluvial valley floor, for  
25 instance -- is certainly relevant to the question that

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1 you-all have to decide ultimately, as to whether or not  
2 the Division made the correct call in reversing its  
3 earlier call that it was an AVF. And to say somehow that  
4 it's not relevant to allow Mr. Lips to go out onto the  
5 property, sample it, take a look at it, and add to your  
6 understanding what he can on those issues, simply bends  
7 the idea of relevance all askew.

8 It would be somewhat irregular for me to -- or  
9 for us to listen to Mr. Lips explain why an inspection is  
10 necessary. But he's prepared to do that, if the Board  
11 wishes to hear it, either by a direct statement or by  
12 having me call him as a witness. I don't think that's  
13 necessary. I believe the principles are pretty well put  
14 before you, but if you think it would be helpful to you,  
15 Mr. Lips is here and ready to explain the need for an  
16 onsite visit for himself.

17 For all the reasons I've just said, I again urge  
18 you to grant the motion, allow us to visit the property,  
19 and take up the matter of how broad other discovery  
20 should be in a subsequent motion.

21 CHAIRMAN JOHNSON: Thank you, Mr. Morris.

22 Mr. Alder.

23 MR. ALDER: Briefly I would just say, I think  
24 one of the things that sort of would be helpful would be  
25 to know the purposes of the inspection. I mean,

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1 originally this was just viewed as sort of a request for  
2 inspection. And I frankly thought it might just be so  
3 that counsel from out of town would have an idea what the  
4 area looks like. That's a different thing than if it's  
5 an inspection for a specific purpose. And it might be  
6 helpful to me, at least, in responding further by  
7 research in this matter, if that was more specifically on  
8 the record.

9 Obviously, if you have a slip and fall case and  
10 you are defending it or presenting it, you want to see  
11 the place, get a feel for where they fell and what other  
12 circumstances were there. If it's a contract case,  
13 there's no point in seeing the place where the contract  
14 was written or what it had to do with that issue at  
15 stake.

16 So I guess when I said earlier that I would like  
17 the opportunity to provide additional information, it's  
18 partly ignorance about that. I mean, maybe the site  
19 inspection out in the middle of a snowstorm is  
20 sufficient. It's certainly not precluded. Maybe it is;  
21 I don't know how the roads are.

22 But the other issue is, under the rules of civil  
23 procedure, I'm not sure what the legal constraints are.  
24 And I just confess that I practice before the Board on  
25 administrative matters, and we don't have discovery very

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1 often. And I can't speak to that. And I'd like that  
2 opportunity. And that's all I have at this time.

3 CHAIRMAN JOHNSON: Thank you, Mr. Alder.  
4 Mr. Bayer?

5 MR. BAYER: Thank you. This goes back to what I  
6 said at the very beginning. If we start discussing  
7 discovery today -- piecemeal -- before the petitioners  
8 define what is the scope of the inquiry, then this is  
9 going to be a never-ending process. That's No. 1.

10 Secondly, Mr. Morris incorrectly stated the Utah  
11 Rule of Civil Procedure 26(b)(1). 26(b)(1) says "what is  
12 reasonably calculated to lead to the discovery of  
13 admissible evidence," not relevant evidence. It's got to  
14 be admissible. For it to become admissible, it's got to  
15 have something to do with what is the inquiry before this  
16 Board. If they want to go out and pick up rocks and  
17 sample water and wander around and look, that doesn't  
18 have anything to do with what they just finished stating.  
19 The allegation within the petition is that the Division  
20 did not look at the issue of the AVF. Their challenge is  
21 not that it is not an AVF, or is an AVF, it is that the  
22 Division failed to properly make that determination.

23 If they want to go out and pick up rocks,  
24 there's public road. They can go on the public road, and  
25 they can go pick up rocks. They could look at it. They

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1 can do whatever they want to do. That's not what the  
2 issue is before the Board. When we start talking about  
3 discovery and what's going to be used in discovery, it's  
4 admissible evidence -- what is going to be admissible in  
5 this inquiry.

6 You know, for them to make a mine site visit so  
7 they can come up with AVF determination, so that they can  
8 look hydrologic data, so they can look at the lay of the  
9 land, they can't make a geologic analysis over a couple  
10 of days. They can't do anything other than just  
11 sightseeing. I'm not trying to say they can't have  
12 discovery. What I'm saying is, is we've got to figure  
13 out what is the scope of what we're doing.

14 I don't want us to be in a posture saying, We've  
15 got to wait until March before they can go out there and  
16 do a site visit. That site visit is going to do nothing  
17 but slow this Board up, because the scope of this  
18 examination has nothing to do with the site visit. I'm  
19 not saying that the site visit is a ruse; but what I'm  
20 saying is, is if we get lost in a whole concept of "We've  
21 now got to give them the opportunity to go out and visit  
22 and redo this entire permit application package," that's  
23 not what the inquiry is before this Board. We need to  
24 start with the inquiry. And then we step back from that  
25 and figure out what will be allowed as discovery. That's

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1 the point.

2 Arguments are being made regarding Lila Canyon.  
3 Well, there's Lila Canyon I. Lila Canyon I said it's an  
4 administrative review, it's not de novo. This has got an  
5 intense, huge administrative record that is ripe for  
6 review.

7 I ask that we first define the analysis and then  
8 talk about discovery.

9 MR. JENSEN: Why don't we take a five-minute  
10 break.

11 CHAIRMAN JOHNSON: Mr. Bayer, do you need a  
12 break?

13 MR. BAYER: No, sir.

14 CHAIRMAN JOHNSON: Are you ready to go?

15 MR. BAYER: I'm ready to go.

16 CHAIRMAN JOHNSON: Do you want to take another  
17 sip of water?

18 MR. BAYER: I've concluded. I'm fine.

19 CHAIRMAN JOHNSON: Are you sure?

20 MR. BAYER: Yes, Sir.

21 CHAIRMAN JOHNSON: You've concluded?

22 MR. BAYER: As far as my reply, yes, sir. I  
23 think the Board understands the issue.

24 CHAIRMAN JOHNSON: Okay.

25 Mr. Bernard.



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1           MR. BERNARD: Kane County respectfully submits  
2           that Mr. Bayer is correct that the scope of discovery  
3           needs to first be defined, but that it should be defined  
4           properly. Thank you.

5           CHAIRMAN JOHNSON: Excuse me.

6           Let's open this up for questions from the Board  
7           and to the various parties.

8           I would like to start off with, myself, with --  
9           I'd like to get something clarified for sure. An  
10          informal conference was held on this permit quite some  
11          time ago. Was that informal conference requested by SUWA  
12          or by the petitioner?

13          MR. BLOCH: Mr. Chairman, it was. And I think  
14          it was also requested by several residents in Kane and  
15          Garfield County.

16          CHAIRMAN JOHNSON: Okay. SUWA was one of the  
17          parties that requested the informal conference?

18          MR. BLOCH: That's correct.

19          CHAIRMAN JOHNSON: Did SUWA participate in or  
20          attend the informal conference?

21          MR. BLOCH: SUWA did not. SUWA, and other  
22          members of the petitioners, did attend and did  
23          participate, not acting in the capacity of the  
24          organization but as individuals.

25          CHAIRMAN JOHNSON: And what was the reason for

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1 SUWA not attending the informal conference after being  
2 one of the requestors for the informal conference?

3 MR. BLOCH: If I'm recollecting correctly, Mr.  
4 Chair, we had requested that the conference be up here,  
5 and were anticipating it was going to be something more  
6 in the nature of what had happened in the Lila Canyon  
7 matter a few different occasions, which was an  
8 opportunity for the parties to sit down in a small,  
9 informal setting and discuss some of the issues.

10 What the Division proposed and ultimately held  
11 in Alton was much more in the nature of a public hearing,  
12 where members of the public and other attendees were  
13 allowed to stand up, state their position. There wasn't  
14 any, sort of, dialogue -- the sort of dialogue that we'd  
15 had throughout the Lila Canyon process. So we decided to  
16 allow -- to certainly inform SUWA members, other members  
17 of the petitioners who had asked for the informal  
18 conference, that the Division was holding one; it was  
19 going to be held in Alton; and to encourage them to  
20 attend if they wanted to do so. And as I said before,  
21 several of them did.

22 CHAIRMAN JOHNSON: Do other Board members have  
23 questions for the any of the parties regarding this  
24 matter? Mr. Jensen.

25 BOARD MEMBER JENSEN: I'm just trying to get my

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1 arms around the request and also, I guess, a little bit  
2 of the procedure.

3 Putting aside the request to visit the property  
4 for a moment, and assuming that that had taken place.  
5 Isn't the issue before this Board of whether the Division  
6 acted appropriately and looked at the right criteria in  
7 granting the permit? I mean, it seems to me that that's  
8 what's before us. And it would be -- just procedurally  
9 going forward, it would seem to me that the petitioners  
10 would be putting on proof about what is either lacking in  
11 its entirety or is lacking in some manner as to each of  
12 the issues.

13 Is that how you envision this going forward?

14 MR. MORRIS: That is not my understanding of the  
15 Lila Canyon ruling. That is how a permit review  
16 proceeding would go forward under the federal rules that  
17 govern OSM's permitting decisions. But if I may, just to  
18 complete the answer, you had -- I've lost my point.

19 BOARD MEMBER JENSEN: I was looking at --  
20 Mr. Morris, I was looking at your Request for Agency  
21 Action and the allegations, and it seemed to me that you  
22 were getting at the lack of these things that the  
23 Division and Alton Coal failed to do.

24 MR. MORRIS: That is my point that I had just  
25 last track of there. Yes, we say that the permit

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1 application is in many respects incomplete. We also  
2 say -- I think I counted more than 20 times in our  
3 Request for Review -- that it is inaccurate. And  
4 discovery is most useful in testing the accuracy and  
5 demonstrating the inaccuracy of information that is in  
6 the permit. And it's my understanding, just to conclude,  
7 that the Lila Canyon decision gives us the right,  
8 basically puts the burden on us to do that, using  
9 discovery.

10 BOARD MEMBER JENSEN: Listening to Mr. Bennett  
11 (sic) though, how are you going to demonstrate that, in  
12 any period of time that's relevant to this case? I have  
13 a concern, I guess, that this thing just starts all over  
14 again, and that three years from now we're still here.

15 MR. MORRIS: We're asking for one site visit,  
16 not contingent site visits into the future. We're asking  
17 for a two- to three-day site visit based upon what  
18 Mr. Lips has informed us he will need to collect the  
19 relevant evidence that he believes is out there,  
20 primarily on the alluvial valley floor issue, but on  
21 other hydrologic issues, as well, that depend upon either  
22 sampling or physical observation of the premises.

23 We do not make this request as the first of many  
24 requests for additional site visits. I can't say -- no  
25 one could possibly say -- that something couldn't come up

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1 during the first site visit that might not lead us to ask  
2 for a second. But I can't imagine what that is. I've  
3 asked Mr. Lips whether he anticipates anything like that,  
4 and we do not. This is simply a focused site visit to a  
5 proposed coal mine facility, that I believe is essential  
6 to our presenting our case on something close to an equal  
7 footing with the other side, No. 1. And No. 2, doing the  
8 job that the Lila Canyon decision tells us we need to do  
9 here.

10 BOARD MEMBER JENSEN: Well I apologize. I  
11 wasn't here for the Lila Canyon, either I or II, and I'm  
12 just relying on what I look at in your request. And if I  
13 just look at your request, it seems to me that you have  
14 the burden of demonstrating the deficiencies or the  
15 inaccuracies. Is that incorrect?

16 MR. MORRIS: Yes, we do. And that's why  
17 discovery is relevant, especially with respect to  
18 inaccuracies. We can certainly tell you what isn't there  
19 without discovery. On the other hand, we can't tell you  
20 what ACD -- what data ACD may have that it did not submit  
21 in support of this permit. I don't know that there's  
22 any. And I'm not charging, right now, that there's any.  
23 But I want to ask them that question; because I know in  
24 handling previous proceedings in other jurisdictions,  
25 that companies have collected far more data than they

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1 choose to submit with a permit application.

2 BOARD MEMBER JENSEN: But that's a whole  
3 different area of discovery, asking to see and produce  
4 the record as against a site visit. I mean, I can kind  
5 of understand, like, wanting to see what the lay of the  
6 land is, so I know where -- what I'm talking about. I  
7 don't have too much problem with that. But going out and  
8 doing all of this testing again to show why it's  
9 deficient, I frankly have a problem with that, because it  
10 seems to me that it will just be never ending.

11 MR. MORRIS: I can assure you that we believe,  
12 on the basis of our conversations, our understanding with  
13 Mr. Lips, that he can get his job done in two to three  
14 days. If you would like for him -- the Board would like  
15 for him to speak to what he can accomplish in a two- to  
16 three-day inspection -- again, primarily with respect to  
17 the alluvial valley floor issue -- again, I would be  
18 happy to turn the mic his way, or to call him as a  
19 witness if you want to proceed on it formally.

20 BOARD MEMBER JENSEN: I guess I would be more  
21 interested in knowing that this is not the beginning of a  
22 whole series of further requests to inspect and sample.

23 MR. MORRIS: This is not.

24 CHAIRMAN JOHNSON: Mr. Morris -- are you  
25 through, Mr. Jensen?

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1 BOARD MEMBER JENSEN: I'm through.

2 CHAIRMAN JOHNSON: Mr. Morris, could you clarify  
3 one thing for me that -- I'm possibly interested in  
4 hearing Mr. Lips' explanation of what he's going to be  
5 looking for and how it will help move this case along.  
6 I'd like you to clarify one thing that you said in your  
7 statement.

8 You said that if the respondents had not  
9 protested against your request for the site inspection,  
10 it would have already been held. And now you're going to  
11 be impaired because there's snow on the ground.

12 MR. MORRIS: That's right.

13 CHAIRMAN JOHNSON: Reading from your request,  
14 however, it says "Petitioners request entry on the  
15 subject lands beginning at 8 a.m. on December 10, 2009,"  
16 which is tomorrow, "and continuing through 5 p.m. on  
17 December 12, 2009."

18 So I don't understand why the respondent's  
19 objection to your request has made it so that now you  
20 can't conduct proper inspection because of snow.

21 MR. MORRIS: Because we certainly would have,  
22 once we knew the snow was coming, offered to get down  
23 there before the snow hit and put a snow cover on the  
24 situation. We had informal discussions with counsel --

25 CHAIRMAN JOHNSON: Mr. Morris, I listen to the

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1 weather on the -- Utah weather on the news every night,  
2 and I didn't know until Monday that the snow was going to  
3 be hitting.

4 MR. MORRIS: Well, it's possible that we could  
5 not have foreseen that. But my point is this: That we  
6 tried to expedite this as much as we possibly could. We  
7 set the proposed inspection for tomorrow and Friday and  
8 Saturday because that's when I was going to be here. But  
9 Mr. Lips was ready to go and would have gone earlier.

10 CHAIRMAN JOHNSON: But you requested the 10th  
11 through the 12th.

12 MR. MORRIS: Yes, we did.

13 CHAIRMAN JOHNSON: So if the Board were to grant  
14 the inspection, I'm assuming you're still okay with the  
15 Board granting what you requested, the 10th through the  
16 12th?

17 MR. MORRIS: What we made clear in our reply was  
18 that weather conditions could make it impossible to do  
19 the inspection on the 10th or the 12th.

20 CHAIRMAN JOHNSON: When do you think snow will  
21 be off the ground?

22 MR. MORRIS: Mr. Lips advises me that it could  
23 be April, it could even be May. In a milder winter, it  
24 could be much sooner than that. And we're ready, as I  
25 said in the opening, to go as soon as conditions allow.



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1           CHAIRMAN JOHNSON: So you are saying that the if  
2 the Board were to grant your request for inspection, it's  
3 possible, in other words -- another word would be  
4 possible or likely -- that this inspection could not be  
5 made until April, and then the hearing will be able to go  
6 forward?

7           MR. MORRIS: That's right.

8           CHAIRMAN JOHNSON: Okay.

9           Mr. Payne, do you have any questions?

10          BOARD MEMBER PAYNE: I guess that was my  
11 question, as well. I mean, is there still a desire to go  
12 out there tomorrow? I mean, could anything be gained by  
13 that?

14          MR. MORRIS: No, sir.

15          BOARD MEMBER PAYNE: Okay. And then to follow  
16 up on that, continually who you reference that data --  
17 the data would primarily focus on the AVF issue. Without  
18 getting into a discussion of merits and the data, is it a  
19 question of there are no -- there are insufficient data  
20 around determining whether there's an AVF, or is it a  
21 question of interpretation? Because I think those are  
22 two separate matters.

23          MR. MORRIS: There was a determination by the  
24 Division in 1988, I believe, that that area was an AVF.  
25 It followed the collection of a lot of data and the

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1 analysis of that data.

2           There was a determination made shortly before  
3 the granting of this permit, or at the time of granting  
4 of this permit, just the other way around, without any  
5 data that I'm aware of -- any new data that I'm aware of,  
6 other than Division personnel walking the site for, I  
7 believe, less than two days. And so our point is not  
8 that there's not adequate data to determine that it is an  
9 AVF. The Division properly determined that it was an AVF  
10 in 1988 or '89. We do think there is no data to support  
11 the Division's reversal decision. And we want to go out  
12 and demonstrate that the '88 determination was a correct  
13 one.

14           BOARD MEMBER PAYNE: So you just said two things  
15 that strike me. One is, the Division collected a lot of  
16 data -- if I recall correctly -- implying that there are  
17 data there. Then you said they made the proper decision,  
18 which would imply that you think those data are useful  
19 and valid and an interpretation could be made from those  
20 data.

21           So I'm not disinclined for you guys to have a  
22 site visit, but I'm struggling to see the value in one or  
23 two days. You just criticized, the Division only spent  
24 two days on the site --

25           MR. MORRIS: And collected -- I'm sorry.

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1           BOARD MEMBER PAYNE: -- and in response to their  
2           determination of yes or no on an AVF issue, you are going  
3           to spend two days and make a decision, as well?

4           I guess where I'm coming from, it seems like  
5           this is more a question of interpretation of existing  
6           data rather than a need for new data. Can you comment on  
7           that?

8           MR. MORRIS: My understanding of the Division's  
9           AVF determination, that it was not based upon the '88  
10          data -- a reinterpretation of the '88 data,  
11          exclusively -- that it was based upon impressions gained  
12          upon a walk across the property, without the collection  
13          of the kind of samples and data that Mr. Lips wishes to  
14          collect.

15          CHAIRMAN JOHNSON: Mr. Morris, if the data that  
16          was available in 1988 allowed the Division to, what you  
17          called, "properly determine" the issue of AVF, why would  
18          Mr. Lips not be able to take that same data, then, to go  
19          through it for the Board and bring us to that conclusion,  
20          that you say the Division made in 1988.

21          MR. MORRIS: Because we anticipate that experts  
22          for ACD and the company will say that some other factors,  
23          unknown to us and not in the permit application,  
24          warranted a reinterpretation of the '88 data, or  
25          warranted a different conclusion from the '88 data. We

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1 want to nail this down for the Board -- to have Mr. Lips  
2 evaluate the factors that need to be evaluated to  
3 determine whether this area is an alluvial valley floor  
4 or not. He says he can do it in a two- or three-day site  
5 visit. And that is why we've made the request, in  
6 addition to the other factors.

7 I mean, even without his collecting any data, we  
8 would need the site visit for the familiarization  
9 purposes that I indicated separately.

10 BOARD MEMBER PAYNE: Mr. Chairman, I think I  
11 would be interested, if it's appropriate in the hearing,  
12 what kind of data would be collected, as I'm struggling  
13 there to get my arms around what two or three days of  
14 data collection is going to do to help.

15 CHAIRMAN JOHNSON: Okay.

16 Mr. Gill, did you have a question before we go  
17 into that?

18 BOARD MEMBER GILL: I do have some questions.

19 Did I understand, Mr. Morris, that in your  
20 opening argument you said that we did not have to -- I  
21 don't want to put words in your mouth -- but basically,  
22 the evaluation or the standard of good cause shown had  
23 already been met in Lila I or II?

24 MR. MORRIS: No, I don't believe I discussed  
25 Lila, or meant to, at least. I may have misspoken.

[45]

1           MR. GILL: Then I'm trying to get my arms around  
2 a few concepts, so I'm looking for some kind of  
3 definition.

4           Define a "two- or three-days." Is that camping  
5 overnight? Is it walking through? Are you going to  
6 disturb the soil? Would you walk a stream? What does  
7 that mean, two or three days in terms of time, first, and  
8 then activity second.

9           CHAIRMAN JOHNSON: Excuse me, Mr. Morris. I'm  
10 inclined, myself, to allow Mr. Lips to talk about what he  
11 intends to do with that.

12          MR. GILL: That's okay. I understand that. I'm  
13 just trying to -- is it 24 hours or is it eight hours?

14          CHAIRMAN JOHNSON: Okay.

15          MR. GILL: Is it daylight or dark? Or I just  
16 want to know...

17          CHAIRMAN JOHNSON: Yeah. I'm just wondering if  
18 it would be better served to have Mr. Lips answer that  
19 than Mr. Morris.

20          MR. GILL: It very well could be. But I'd like  
21 --

22          CHAIRMAN JOHNSON: Okay.

23          BOARD MEMBER GILL: -- but let me just have you  
24 understand.

25          CHAIRMAN JOHNSON: Could we hear your response,

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1 Mr. Morris?

2 MR. MORRIS: My conversations with Mr. Lips lead  
3 me to believe that he would be out there during daylight  
4 hours. And that he and I would find a place, motel rooms  
5 or whatever, to stay in overnight, and then come back as  
6 daylight began again.

7 But I think whatever Mr. Lips' intention is, is  
8 what's important here. Because I would be there for my  
9 own purposes, which would not take me two or three days.  
10 So the additional time and the additional activities,  
11 besides simply walking the property, would be those that  
12 Mr. Lips could speak to much better than I could.

13 BOARD MEMBER GILL: And then, when you say the  
14 term the "property," or the "subject property," how do  
15 you define that?

16 MR. MORRIS: In our request we have defined it  
17 as the permit -- proposed permit area or the permit area  
18 and the areas beyond that, that are included in the  
19 cumulative impact area.

20 MR. GILL: Are those areas defined by  
21 different -- private versus, say, governmental ownership?

22 MR. MORRIS: We have only asked for access to  
23 lands that ACD controls.

24 BOARD MEMBER GILL: In terms of controls access.

25 MR. MORRIS: Controls access to, yes.

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1           BOARD MEMBER GILL: And this now is a question  
2 to Alton.

3           Do you have the complete rights to allow access,  
4 or are there other intervening third parties that might  
5 have lands that may or may not have given access, or  
6 could you -- are the rights of other third parties  
7 involved in this?

8           MR. BAYER: Yes, sir. That is one of the issues  
9 that I felt that I needed to address with the Board.

10           I have coal leases with private landowners that  
11 give me the right to go operate a coal mine. I don't  
12 have a lease with them that allows me to say SUWA gets to  
13 go on their property and conduct tests. I can't give  
14 them authority to do that.

15           BOARD MEMBER GILL: Okay. First of all, in  
16 discussing the issues, I read your petition. And you had  
17 a number of statements there. Are those the issues that  
18 we are trying to pursue in terms of this visit? Are  
19 there undisclosed issues, or are there issues that could  
20 be raised, new issues, outside of your petition?

21           MR. MORRIS: I believe with the convening of  
22 this hearing today, that we can no longer amend.

23           BOARD MEMBER GILL: Say that again.

24           MR. MORRIS: I believe that we can no longer  
25 amend our request for agency action.

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1           BOARD MEMBER GILL: What would be the relevance  
2 of this new data? I guess it's a follow up. I just  
3 would like to hear you, and then I'd like to hear all the  
4 coal.

5           The relevance is that -- let me take that back  
6 and restate it.

7           Are there issues where there was not data taken  
8 or in the record?

9           MR. MORRIS: There are numerous issues, as I  
10 recall, where there was not sufficient data taken.

11          BOARD MEMBER GILL: That was my second question.

12          MR. MORRIS: Right. I don't recall any issue in  
13 which there was absolutely no hydrologic data taken.

14          BOARD MEMBER GILL: And then -- so I'm hearing  
15 you say that there are no issues in which there was no  
16 data. It is appropriate to discuss whether it was  
17 insufficient. Are there issues where the data was  
18 inaccurate?

19          MR. MORRIS: We believe so. We believe at least  
20 that there may be, and we want to test that.

21          BOARD MEMBER GILL: How would it be --

22          MR. BAYER: Mr. Gill, what can I answer for you,  
23 sir?

24          BOARD MEMBER GILL: I'm trying to get to three  
25 things. The statute says that for good cause shown, the



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1 Board can do -- there is a right there. I'm trying to  
2 say, Okay, is that hurdle met by inquiring about it? And  
3 then I'm furthering that inquiry by saying, Okay, if you  
4 got the data, how would it be relevant, and how would it  
5 be material, and how would it be admissible? I'm just  
6 trying to figure out, you know, what would that would be?

7 Mr. Morris, would that data come in as expert  
8 witness-type data, expert data in terms of its  
9 admissibility?

10 MR. MORRIS: The data itself would come in as  
11 the factual component of Mr. Lips' anticipated testimony.  
12 His conclusions regarding the data would come in as his  
13 expert testimony.

14 BOARD MEMBER GILL: Relevance, burden of  
15 proof -- as for good cause shown that we should do  
16 this -- materiality, relevance, admissibility. I'm  
17 struggling with that, because there is a fine line  
18 between that. And we struggled with it -- I wasn't here  
19 for all of Lila, but I was here for part of it. And it  
20 was a hard decision because it was: Is the burden of  
21 proof met? And then if that burden of proof is met, then  
22 what was presented. So I'm dealing with this a little  
23 bit, and I'm struggling.

24 MR. BAYER: And I understand why you are  
25 struggling, Mr. Gill, and I don't want to be pedantic.

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1 And I that's the fundamental issue that we all have to  
2 come to grips, is what is it that we are trying to do in  
3 this process? And each one of us is trying to figure out  
4 where is this going to take us, this pathway that they  
5 are developing.

6 One of the things that Mr. Morris talked about  
7 is he says that they believe that there were inaccuracies  
8 within the permit application package. But yet they say  
9 that they have to go out and conduct discovery so they  
10 can find out what were the inaccuracies. I don't  
11 understand that. When I make an allegation within a  
12 complaint, I have to have a basis in fact and knowledge  
13 before I make that allegation.

14 They have made allegations within the petition.  
15 If there are inaccuracies within the permit application  
16 package, they should already know what those inaccuracies  
17 are or they couldn't have put it into their petition.  
18 That would have been a violation of Rule 11.

19 As it relates to this idea now of whether or not  
20 good cause is shown, the only way we understand what is  
21 going to be good cause is trying to figure out what is  
22 the purpose of any of the discovery. Mr. Morris  
23 indicated -- and I'm not sure whether or not any of you  
24 picked up on this -- but he said that they're not  
25 entirely sure that Alton Coal submitted all the data that

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1 Alton Coal compiled; therefore, they may have to go out  
2 and start taking depositions of Alton Coal to see what  
3 other data Alton Coal has. I'm sorry.

4 Their petition states that the permit  
5 application package is void because it didn't contain  
6 necessary information as required by statutes and  
7 regulations. If I have information that I didn't put it  
8 in and it was supposed to be there, that's my fault. I  
9 don't get my permit. And the Division is going to tell  
10 me, Your permit application is not complete. And they  
11 send it back to me. They have a checklist that they  
12 follow. And they sent it back to us, and we have to give  
13 more information.

14 So I don't understand why they're going to have  
15 to start taking depositions of Alton Coal Development,  
16 and why they are going to have to start doing requests  
17 for production of documents, and why they are going to  
18 have to submit interrogatories to Alton Coal Development  
19 to determine whether or not our permit application  
20 package has the correct information in it. It either  
21 does or it doesn't. And that's what I'm talking about.  
22 And that's what I'm stressing, that we really need to  
23 figure out what is the scope of what we are trying to  
24 conduct here.

25 BOARD MEMBER GILL: I'm trying to go the same

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1 way. I heard Mr. Morris just say that this hearing,  
2 though, is for the purpose of the access, that that may  
3 be another issue for another day in terms of depositions,  
4 and such.

5 Does the public have any access rights to the  
6 subject lands?

7 MR. BAYER: Well, that's also -- Mr. Gill, let  
8 me interject for a moment.

9 BOARD MEMBER GILL: And if that's unfair  
10 question, I'm just trying to find out the definition of  
11 terms.

12 MR. BAYER: Let me interject this: One of the  
13 original proposals that was put forward to Alton by  
14 Mr. Morris regarding the site visit, is that they also  
15 wanted to take citizens of Panguitch with them, and they  
16 wanted to take videographers, and wanted to have this big  
17 parade of people that were going to go out to the site.  
18 And we said no. I mean, I don't want to be responsible  
19 for it, No. 1. And No. 2, I don't have authority to let  
20 everybody in the world go visit these sites. As I said,  
21 I've got a lease to go mine coal. I don't have a lease  
22 to open up a recreation area.

23 There are roads that go through here. They can  
24 actually see the area. They can drive through there.  
25 They can get a bird's eye view of it. There are aerial

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1 photographs of these sites. There are topographic maps  
2 of these sites. The Division has a plethora of  
3 information -- photographs, maps, charts and everything  
4 anybody could ever want to look at this site.

5 I don't understand why they have to put boots on  
6 the ground as it relates to this permit challenge. I  
7 can't give them permission to do that.

8 BOARD MEMBER GILL: Let's exclude the public  
9 road.

10 MR. BAYER: There's a public road that goes  
11 right through the middle of it.

12 BOARD MEMBER GILL: Let me -- hang on just one  
13 second, so I'm getting the definition terms.

14 Except for the public roads and the border to  
15 it, does the public have access rights outside of the  
16 right-of-way for that public road?

17 MR. BAYER: I would think not. It's private  
18 land. Not unless the private landowner gives them  
19 permission. It would be no different that if somebody...

20 BOARD MEMBER GILL: Somebody could give it, but  
21 they don't have a public right as to --

22 MR. BAYER: No, sir. It would be no different  
23 than the public wanting to walk my farm, and I would  
24 respectfully say, "Get off." Sometimes I would not do  
25 that respectfully. It would depend upon who it was.

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1           BOARD MEMBER GILL: So it is fair to say that  
2           that is an accurate -- that if I understood it right,  
3           that this is private land?

4           MR. MORRIS: That's our understanding. And  
5           that's why we have asked for...

6           BOARD MEMBER GILL: On that private land, does  
7           that private land -- is it completely covered by the Sink  
8           Valley drainage, or is part of the land covered by the  
9           Sink Valley drainage and the other -- I don't know where  
10          Kanab Creek is.

11          MR. MORRIS: They're different --

12          CHAIRMAN JOHNSON: I know where Mammoth Creek,  
13          is but I don't know where Kanab Creek is.

14          MR. MORRIS: My understanding is that they are  
15          two different drainages, and they are separate.

16          BOARD MEMBER GILL: Okay. But not all of the  
17          property is in the drainage?

18          MR. MORRIS: That's right.

19          BOARD MEMBER GILL: What's the converse of that?  
20          Does the property extend beyond the drainage?

21          MR. MORRIS: It's my understanding that it does.

22          CHAIRMAN JOHNSON: Mr. Bernard, did you have a  
23          comment?

24          MR. MORRIS: What are we talking about in terms  
25          of property, Mr. Gill? I'm sorry.

[55]

1 BOARD MEMBER GILL: Pardon me? You are asking  
2 me what I'm asking you?

3 MR. MORRIS: What I'm trying to qualify is that  
4 my responses are the property that we are seeking to  
5 inspect, which includes the permit area and those  
6 portions of the cumulative impact area that ACD controls  
7 access to.

8 BOARD MEMBER GILL: Are there parts of the  
9 permit area that are not in the hydrology...

10 MR. MORRIS: That are not in Sink Valley?

11 BOARD MEMBER GILL: Yeah.

12 MR. MORRIS: May I confer for a moment?

13 BOARD MEMBER GILL: And then, if they are not,  
14 is it a sage brush -- sage grouse issue that you need?  
15 Or is this hydrology...

16 MR. MORRIS: This is a hydrology-driven request  
17 site inspection. Mr. Lips is our expert on geology and  
18 hydrogeology, not upon sage grouse. We don't have, as  
19 yet, an expert on sage grouse, and do not anticipating  
20 making a site visit for that.

21 BOARD MEMBER GILL: And then in terms of the  
22 alluvial valley -- I understood that to be called ABF?

23 MR. BAYER: AVF.

24 MR. MORRIS: AVF. Alluvial Value Floor.

25 BOARD MEMBER GILL: I'm hearing impaired, just

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1 so you all know. Is the alluvial valley floor less than  
2 the permit area?

3 MR. MORRIS: May I consult for a moment with Mr.  
4 Lips?

5 BOARD MEMBER GILL: Yeah.

6 MR. BAYER: Mr. Gill, the alluvial valley floor  
7 area, that is anticipated as being the AVF area,  
8 comprises a portion of the permit area. It does not  
9 encompass the entire permit area.

10 BOARD MEMBER GILL: So for purposes of my  
11 understanding, if you -- if I said to myself that, What  
12 they want to do is go onto that portion of the permit  
13 area dealing with the alluvial valley floor, that is a  
14 fair understanding of your request?

15 MR. MORRIS: No, it's broader than that. We  
16 want to go on to -- again, for familiarization purposes.

17 BOARD MEMBER GILL: This is just for the permit  
18 area. I'm just talking about the permit area.

19 MR. MORRIS: Right.

20 BOARD MEMBER GILL: I know there's a larger  
21 area, the cumulative impact area, that you'd like to go  
22 on. I'm just trying to define terms.

23 MR. MORRIS: We would like to go on all of the  
24 permit area. If it's not all -- if all of the permit  
25 area is not alluvial valley floor -- and Mr. Lips



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1 suggests that that's at least a possibility -- we'd like  
2 to see all of the permit area for familiarization  
3 purposes.

4 BOARD MEMBER GILL: And that's what I wanted to  
5 get to is, how are you defining it?

6 Mr. Chairman, I think that right now --

7 CHAIRMAN JOHNSON: Mr. Bernard, did you have a  
8 comment you wanted to make?

9 MR. BERNARD: Yes. I just wanted to point out  
10 that the permitted area is entirely posted "No  
11 Trespassing, Private Property, Keep Out." Commissioner  
12 Keaton from Kane County is here with me. He can attest  
13 to that. He actually lives in Alton, is a member of the  
14 Alton City Council as well as the Kane County Commission.

15 BOARD MEMBER GILL: Where is this from the city  
16 of Panguitch? I just happened to drive through that  
17 recently, and I'm trying to figure out where we are in  
18 the overall scheme of things.

19 COMMISSIONER HEATON: I can answer that  
20 question. Alton is 36 miles south of Panguitch on  
21 Highway 89. The coal field is about three miles south of  
22 Alton.

23 BOARD MEMBER GILL: So it's on its way to Kanab?

24 COMMISSIONER HEATON: Yeah. Well it's off on --  
25 it's off on the Kanab Creek range. The road that goes to

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1 Kanab is on the Virgin River range. So it's over  
2 four miles.

3 CHAIRMAN JOHNSON: Would you identify yourself  
4 for the record?

5 COMMISSIONER HEATON: I'm sorry. I'm  
6 Commissioner Heaton from Kane County.

7 CHAIRMAN JOHNSON: Thank you. Are there other  
8 questions from Board members? I'm inclined, myself, to  
9 have Mr. Lips address questions that have been raised  
10 regarding what he intends to do. And without getting  
11 into testimony or opinion, talk about what he would  
12 expect to find on the site that may change or sway the  
13 Board's opinion on this matter. And again, let me ask  
14 first: Did any of the Board members have any...

15 MR. HAROUNY: I have one question, if I may.

16 CHAIRMAN JOHNSON: Okay. Let me ask: Do you  
17 have any opposition to Mr. Lips --

18 BOARD MEMBER HAROUNY: No.

19 CHAIRMAN JOHNSON: -- talking about those  
20 things?

21 BOARD MEMBER HAROUNY: No. But I'd like to ask  
22 Mr. Morris one question.

23 CHAIRMAN JOHNSON: Okay. Go ahead, Mr. Harouny.

24 BOARD MEMBER PAYNE: On your question of  
25 objections, just what are the ground rules for questions

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1 from us and from the other parties for Mr. Lips? We need  
2 to just set that out.

3 CHAIRMAN JOHNSON: I don't think we want to get  
4 into any testimony or opinion.

5 BOARD MEMBER PAYNE: I agree. So I'm just  
6 saying --

7 CHAIRMAN JOHNSON: Just Mr. Lips explaining to  
8 us, as Mr. Morris has said, what it is he intends to do  
9 on the ground, and what he intends to look for.

10 BOARD MEMBER HAROUNY: Mr. Morris, I would like  
11 to know on what basis you made all those allegations of  
12 inaccuracies and all the allegations that have been made,  
13 knowing that this is going to require a lot of time and  
14 effort by the Board and everyone else involved and put  
15 the application in a tailspin, if you will, and not  
16 having the accurate information and then coming in and  
17 asking for a site visit or expert analysis after the  
18 allegations are made?

19 MR. MORRIS: The petitioners made their  
20 allegations based upon, I believe, the allegations you  
21 are talking about concerning hydrology, based upon the  
22 advice of Mr. Lips.

23 CHAIRMAN JOHNSON: Okay. Let's hear from  
24 Mr. Lips, then.

25 MR. BERNARD: May I make a motion before -- or

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1 may I make statement before we --

2 CHAIRMAN JOHNSON: Yes, Mr. Bernard.

3 MR. BERNARD: I believe now would be the proper  
4 time to strike petitioner's request, based on Utah Rule  
5 of Civil Procedure 11. So that's a motion of Kane  
6 County.

7 CHAIRMAN JOHNSON: Would you explain Rule 11 for  
8 us, please?

9 MR. BERNARD: Yes. Rule 11 requires a good  
10 faith allegation and some basis. It's apparent from the  
11 statements of Mr. Morris, there was no investigation,  
12 there was no good faith. There's not even been an  
13 allegation or review of any kind, either on the ground or  
14 of the materials of 1988 or 1989, compared to the current  
15 permit. All he did was make some bald-faced allegations  
16 without a scintilla of evidence. That's precisely what  
17 Rule 11 is designed to preclude. It should be stricken  
18 at this time.

19 CHAIRMAN JOHNSON: We will take your motion  
20 under advisement, Mr. Bernard.

21 MR. BERNARD: Thank you.

22 CHAIRMAN JOHNSON: Mr. Morris, would you like to  
23 respond -- I'd like to limit this to about two minutes  
24 per party to respond to Mr. Bernard's motion?

25 MR. MORRIS: Yes. The allegations in the

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1 complaint are based upon my review as an attorney, but  
2 primarily Mr. Lips' review as a scientific expert of the  
3 data that exists in the permit application, compared  
4 against the understanding of the legal requirements of a  
5 permit application that I've developed over years of  
6 practicing under SMCRA and its implementing state  
7 statutes and that Mr. Lips has developed in dealing with  
8 scientific issues arising under permitting decisions. To  
9 say that that is making bald-faced allegations without  
10 investigation simply -- it's scandalous. It's  
11 unsubstantiated. I spent hours and hours and hours, and  
12 so did Mr. Lips, going through this permit and comparing  
13 the data in it. Now, you may disagree with the  
14 conclusions that he or I have drawn from it. But to say  
15 that there is no basis for those conclusions is simply  
16 wrong.

17 MR. BERNARD: Please share those bases with us,  
18 right now, so we know they are not just conclusionary  
19 bald-faced statements.

20 CHAIRMAN JOHNSON: Thank you, Mr. Morris.

21 Thank you, Mr. Bernard.

22 Mr. Alder, would you like to address the motion?

23 MR. ALDER: No, I wouldn't.

24 CHAIRMAN JOHNSON: Thank you.

25 Mr. Bayer, would you like to address the motion?

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1 MR. BAYER: I have no comment, sir.

2 CHAIRMAN JOHNSON: Thank you. We will take that  
3 under advisement. We're going to have to deliberate on  
4 the question regarding entry upon the permit area,  
5 anyway, so we will take that under advisement at that  
6 time.

7 Mr. Lips, without offering opinion or testimony,  
8 because we're not going to swear you in, would you please  
9 define for us what you intend to do if you are granted  
10 permit -- or access to the permit area, and what types of  
11 things you will be looking for. And please introduce  
12 yourself.

13 MR. LIPS: My name is Elliott Lips. I'm an  
14 engineering geologist and principal in Great Basin Earth  
15 Science, Inc., in Salt Lake City.

16 CHAIRMAN JOHNSON: Thank you.

17 MR. LIPS: Thank you.

18 As Mr. Morris has said, that the primary focus  
19 of the site visit would be related to matters of the  
20 alluvial valley floor determination, and that's based on  
21 site-specific geology and hydrology. In Utah rules, the  
22 key -- one of the key components is unconsolidated  
23 stream-laid deposits holding streams and consolidated  
24 stream-laid deposits holding streams.

25 The documentation of the presence or absence of

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1 those requires several things: Collecting and describing  
2 and analyzing surficial deposits, seeing if they have the  
3 characteristics of being stream laid. It requires  
4 collecting and analyzing detailed data on topography. To  
5 look at the topographic and geomorphic features related  
6 to stream-laid deposits and streams. It would require  
7 mapping geomorphic land forms; for example, the channels,  
8 flood plains, terraces, and also upland areas that would  
9 be excluded from alluvial valley floor determination.  
10 And that's the basic data.

11 And then from that, you can describe the  
12 relationships based on the land forms, relationships  
13 between the land forms, and the processes that resulted  
14 in that. That's the way that the sciences trade out.  
15 You collect the data, topographic, surficial deposit  
16 data, and then make a determination of what those land  
17 forms are. So it's an integration of the geomorphic, the  
18 topography, and the sedimentological characteristics.

19 So those really form the raw data upon which I  
20 would be able to base an opinion on presence or absence  
21 of unconsolidated stream-laid deposits holding streams.  
22 What I anticipate is that it would involve conducting  
23 topographic surveys, stream channel cross-section  
24 surveys, collecting shallow soil samples, hand-dug pits.  
25 I'm not going to dig very deep, so it would not be very

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1       invasive. I just need to look at what the surficial  
2       materials are to collect the appropriate data to  
3       interpret them as stream laid or not stream laid. It  
4       would involve mapping geomorphic land forms, and that  
5       requires walking around and having access to the site and  
6       inspecting stream channels. And those things cannot be  
7       done from the road. That requires being on the ground,  
8       looking at the specific land forms, collecting surveyed  
9       topographic data.

10               CHAIRMAN JOHNSON: Mr. Lips, just a yes/no  
11       question.

12               Is your contention that those types of  
13       investigations have not yet been done on that property?

14               MR. LIPS: It's my contention that they have not  
15       been done.

16               CHAIRMAN JOHNSON: That they have not been done.

17               MR. LIPS: That's correct.

18               CHAIRMAN JOHNSON: Okay. Thank you.

19               Does the Board have any questions for Mr. Lips?  
20       I really don't want to get into any testimony, so I'm not  
21       really going to ask the other parties if they have any  
22       questions for Mr. Lips. Does anybody have any problem  
23       with that? Thank you.

24               Mr. Payne, did you have a question?

25               BOARD MEMBER PAYNE: No.



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1           MR. BAYER: Mr. Chairman, I don't want to ask  
2 Mr. Lips any questions. May I make a comment regarding  
3 his statement?

4           CHAIRMAN JOHNSON: Yes. Can you limit it to two  
5 minutes at the most?

6           MR. BAYER: I don't have any problem with that  
7 at all.

8           I would like to state that there has been an  
9 enormous amount of AVF information that has been reviewed  
10 by the Division. There's AVF considerations for  
11 properties that do not include the permitted area. There  
12 was AVF considerations for part of the permitted area.  
13 And the Division went through an enormous amount of  
14 material to evaluate all of that information before they  
15 came to their conclusion; including that they went to the  
16 site, made on-site review and visits, and looked at an  
17 enormous amount of detail and data that's gone over  
18 decades.

19           Secondly, based upon the description of what  
20 Mr. Lips has given to you, for him to do all that he said  
21 and to do it in a fashion and format that would be  
22 sufficient to give some data of any value would probably  
23 take weeks.

24           CHAIRMAN JOHNSON: One other question,  
25 Mr. Lips -- and again, just a yes/no question.

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1           The request of the petitioner was to grant --  
2           the Board to grant access to the subject lands beginning  
3           at 8 a.m. tomorrow and continuing through 5 p.m. on  
4           December 12, which I believe is Saturday. If the Board  
5           were to grant that access, will you be able to perform  
6           the inspections and tests that you talked about?

7           MR. LIPS: No, I could not.

8           CHAIRMAN JOHNSON: Because of the weather.

9           MR. LIPS: Because of the snow cover. If the...

10          CHAIRMAN JOHNSON: So if the Board were to grant  
11          your request, you would not be able to do the things that  
12          you talked about. Is that correct?

13          MR. LIPS: That's correct.

14          CHAIRMAN JOHNSON: Thank you.

15          MR. ALDER: Mr. Chairman, could I also respond?  
16          If you are going to deliberate at this point, I have a  
17          comment I would like to make, if you will allow me.

18          CHAIRMAN JOHNSON: Let me see if Mr. Gill has a  
19          question, first.

20          BOARD MEMBER GILL: No. Just as long as we  
21          deliberate on the motion.

22          CHAIRMAN JOHNSON: On Mr. Bernard's motion?

23          BOARD MEMBER GILL: Yes. That's the purpose of  
24          going in to deliberate?

25          CHAIRMAN JOHNSON: I thought we were going to

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1 deliberate also on this Question No. 1, as far as the  
2 motion for entry.

3 BOARD MEMBER GILL: Okay. Then I do have a  
4 question, if it's more than just the motion.

5 CHAIRMAN JOHNSON: Yes.

6 BOARD MEMBER GILL: The question is: Would  
7 there be an objection of any of the parties if Board  
8 members went along on this site visit?

9 MR. MORRIS: The petitioners would not object.  
10 They would be happy for you to accompany.

11 MR. BAYER: Mr. Gill, in fact, if there is going  
12 to be an inspection, I want third-party witnesses to it.  
13 It has to be done. I'm sorry. A, I've got to get  
14 permission from the landowners, or you-all are going to  
15 have to figure out how to get permission from the  
16 landowners. And there's got to be independent eyes  
17 watching it. Because the data that's been compiled up to  
18 this point in time was done by DOGM, okay, and we did it,  
19 and lots of other people did it. I can not have an  
20 interested party come in and all of a sudden create data  
21 that no one's going to watch. I'm sorry.

22 CHAIRMAN JOHNSON: Mr. Alder, did you have a  
23 comment.

24 MR. ALDER: Yes, two comments. First of all, I  
25 would just like to throw out the idea that if this motion

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1       were granted, apparently --

2               CHAIRMAN JOHNSON:   Which motion, Mr. Alder?

3               MR. ALDER:   The motion for an inspection --  
4       other than the inspection tomorrow, but the inspection  
5       when the snow is clear.  The consequences apparently are,  
6       and the concerns are that it would put this hearing and  
7       proceedings into a little bit of delay.

8               I think the one possibility the Board could  
9       consider is that there is other discovery that could take  
10      place previously that might better define the need for an  
11      on-site inspection.  Since it's not going to happen until  
12      May or April, it doesn't have to be decided today.  And  
13      there may be other reasons that would evolve as to  
14      whether or not a site inspection is or is not necessary,  
15      also gives the opportunity to better brief this issue.

16              The second thing I was going to say is, I  
17      believe that access to the site is among the authorities  
18      that the Division would be able to grant.

19              CHAIRMAN JOHNSON:   I'm sorry, say that again.

20              MR. ALDER:   I think access to the site under an  
21      application for a permit -- I know we have the right to  
22      assess a site for purposes of inspection.

23              CHAIRMAN JOHNSON:   The Division?

24              MR. ALDER:   The Division does.  I don't really  
25      understand why the company would be able to deny access

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1 for this purpose.

2 CHAIRMAN JOHNSON: Okay. Excuse me, one minute.

3 We're going to take a break and deliberate on  
4 the two motions that are before us right now. We'll be  
5 back as soon as we can. Thank you.

6 (The Board deliberated from 4:33 p.m. to 5:13 p.m.)

7 CHAIRMAN JOHNSON: Let's go back on the record.

8 First of all, the Board has decided to deny the  
9 motion by Kane County to have the petition dismissed at  
10 this point in time, based on Rule 11.

11 Secondly, Mr. Morris, we understand that you  
12 might want to address the Board regarding the motion --  
13 or regarding entry upon the permit area.

14 MR. MORRIS: Pardon.

15 CHAIRMAN JOHNSON: We understand you may want to  
16 address the Board regarding the second motion.

17 MR. MORRIS: Yes. We have spoken with counsel  
18 for ACD and counsel for the Division, and we have agreed  
19 to withdraw our motion without prejudice, and to endorse,  
20 go forward, with Mr. Bennett's suggestion --

21 MR. BAYER: It's actually Bennett Bayer, if  
22 that's okay.

23 MR. MORRIS: Pardon me, Mr. Bayer. I'm very  
24 sorry.

25 MR. BAYER: That's all right.

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1           MR. ALDER: -- Mr. Bayer's suggestion that the  
2 Board determine the scope of this proceeding and the role  
3 of discovery in it, because he's right. That's the first  
4 order of business.

5           We had moved for the site visit on an expedited  
6 basis in an attempt to get on before the snowfall, and  
7 that's not possible now. So we should take the first  
8 things first, in our view.

9           CHAIRMAN JOHNSON: Okay. We appreciate that,  
10 Mr. Morris.

11           So petitioner is withdrawing its motion  
12 regarding entry on the permit area. We appreciate that.

13           The next item we were going to talk about today  
14 is any other requests for leave to conduct discovery that  
15 the parties may anticipate in this cause. In the Board's  
16 order regarding the scope of the hearing, we -- the Board  
17 said that it would like to set a deadline of December 9,  
18 which is -- no, excuse me -- December 16, which is a week  
19 from today, to have motions for leave to conduct  
20 discovery submitted to the Board. Does that date of  
21 December 16 cause any hardships for anybody?

22           MR. MORRIS: It does cause hardship for me,  
23 personally. I have professional obligations that would  
24 preclude me from devoting sufficient time and attention.

25           CHAIRMAN JOHNSON: We know that you now have

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1 three days available that you were planning to be out at  
2 the site.

3 MR. MORRIS: That's right. And I do not believe  
4 I could formulate discovery here in three days.

5 CHAIRMAN JOHNSON: How long --

6 MR. JOHNSON: May I ask a question?

7 CHAIRMAN JOHNSON: Go ahead.

8 MR. JOHNSON: In light of what you've agreed to  
9 brief about the scope of what the Board's job is here and  
10 the effect it has on discovery, do you think that  
11 implicates any future discovery option as well?

12 MR. MORRIS: That was my next point. As I  
13 understand the suggestion from ACD's counsel, the Board  
14 ought to determine the scope of the hearing, the entire  
15 hearing process; in other words, whether Lila Canyon II  
16 continues to apply, or move to some other formulation  
17 that's closer to appellate review and then structure  
18 discovery based upon that. That's what we endorsed, and  
19 that's what we would suggest the Board do, rather than  
20 ask the parties to formulate discovery, which will only  
21 raise the same kind of disputes about scope that we got  
22 into today.

23 We should resolve the disputes about the scope  
24 of discovery and the scope of the hearing, first.

25 MR. JOHNSON: So have you talked at all about

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1 sort of a briefing schedule, or something along those  
2 lines, at all, about this scope issue?

3 MR. BAYER: I would like to propose -- I think  
4 that we can probably in a very short while come up with  
5 what this Board considers as the appropriate scope for  
6 the proceeding. It's at this Board's pleasure as to what  
7 the proceedings should entail from this point forward, so  
8 long as it meets the requirements of due process, so long  
9 as it's in compliance with the Utah regulations. And  
10 this Board, right now, can say, based upon the averments,  
11 the allegations contained within the petition, this is  
12 how we want to conduct the proceeding. This is what we  
13 see should go forward. And based upon that, if there is  
14 any discovery that should be had, it would be within this  
15 scope.

16 BOARD MEMBER GILL: Just so I'm understanding  
17 both of you: Does that include sort of like a scheduling  
18 conference, as well, so that you lay out how this thing's  
19 going to kind of unravel, or is it just the issues of the  
20 scope of the hearing?

21 MR. BAYER: Mr. Gill, obviously it's at the  
22 Board's discretion as to whether or not the Board wants  
23 to have a scheduling conference. The regulations  
24 specifically state that Alton Coal Development is  
25 entitled to a start of the hearing within 30 days. Now,



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1 technically we still have a few days before the hearing  
2 is supposed to start. But we're entitled to actually  
3 have our hearing begin within 30 days. So the question  
4 is how do we expedite this matter? What are we going to  
5 do from this day forward to get this thing rolling along  
6 so that we can come to some sort of resolution.

7 And I think that today, right now, this Board  
8 can figure out what we're going to be doing. And if this  
9 Board says we want to have a scheduling conference on  
10 this date to make sure we're moving forward, then that's  
11 what I'm going to have to do, and I'm going to have to be  
12 here. And I think that we need to set the date, right  
13 now, for when I get to have my hearing.

14 MR. MORRIS: If I may, I don't agree that the  
15 Board ought to -- it certainly can -- but that the Board  
16 ought to set the scope of this hearing without receiving  
17 the statements of all parties on that. I think a  
18 two-week time frame for doing that is reasonable. And we  
19 are prepared to brief the issue of the scope of the  
20 hearing, the applicability of Lila Canyon, and the nature  
21 of discovery if Lila Canyon continues, or the nature of  
22 discovery if this is simply an appellate-type proceeding,  
23 within two weeks.

24 MR. JOHNSON: How about, can you guys live with  
25 a two-week briefing schedule?

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1           MR. BAYER: I'm going to live with whatever the  
2 Board directs me to live with.

3           MR. JOHNSON: Do you wish to brief it, at all?

4           MR. BAYER: Candidly, I think that it's already  
5 been briefed, because you have a petition and you have a  
6 response. And within the petition and response and the  
7 intervenor's petition, you have got the issues framed  
8 right now. And we can look at it, and we can say, Okay,  
9 these are the issues that we need to deal with. There's  
10 basically 11 issues that have been raised within the  
11 petition for review that have to do insufficiency of the  
12 information that's provided, that have to do with whether  
13 or not the Division adequately and properly reviewed the  
14 information, and has to do with whether or not there are  
15 issues associated with wildlife customs, historic sites,  
16 so on and so forth. They're framed. And this Board can  
17 look at the petition and say, These are the issues that  
18 we have to deal with, and how is it that we want to deal  
19 with it? And I think it's already briefed for you.

20           MR. BLOCH: If I could respond for a moment, Mr.  
21 Gill.

22           Since I was here for Lila II, that was something  
23 that the Board found helpful, to have briefing from all  
24 parties. So I suppose I'm just echoing the sentiments,  
25 but also trying to provide some background on how the

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1 Board arrived at that decision. It did invite, and the  
2 issue was briefed, what the scope of the review should  
3 be. So we would renew our request that the Board permit  
4 us to file a brief on the scope of the hearing.

5 MR. ALLEN: Mr. Chairman, may I respond?

6 CHAIRMAN JOHNSON: Mr. Allen.

7 MR. ALLEN: I think it's possible that the  
8 parties are talking past each other. Mr. Bayer's  
9 argument had to do with definition of the scope of the  
10 petition filed by Sierra Club in this matter. And his  
11 argument, as I understood it, was that obtaining some  
12 definition of the scope of what was being claimed to be  
13 error had to do with what type of discovery was  
14 necessary.

15 Now, the issue we addressed in Lila II was what  
16 should be, not the scope of the petition or the scope of  
17 the claims, but the scope of the Board's review. And  
18 that's quite another question.

19 I don't know that Alton feels that it's  
20 necessary for the Board to revisit that issue now. And  
21 certainly as the parties make their discovery requests to  
22 the Board, they can argue to the Board about the  
23 significance of the Lila II decision or the Lila I  
24 decision, for that matter, and how it bears on the  
25 relevance of discovery.

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1 MR. ALDER: Mr. Chairman -- go ahead, I'm sorry.

2 MR. JOHNSON: How about the Division? Did you  
3 have any --

4 MR. ALDER: I think that maybe this issue has  
5 not been raised properly by a motion by ACD. I don't  
6 think -- at least what I hear them saying isn't the same  
7 thing as -- I think we are talking past each other.

8 The question -- the initial question is, is this  
9 an appellate, and I think Mr. Bayer has used the word  
10 "appellate" or "appellate like" and meant it somewhat  
11 differently than it was used in Lila I. In Lila I, we  
12 said -- or this Board said there was a record and the  
13 review of appellate in nature, and you reviewed the  
14 record for error.

15 In Lila II, it was determined that this was the  
16 only opportunity the parties had for a hearing on the  
17 record which required an opportunity to cross-examination  
18 and present evidence. And so they said it was more  
19 than -- it was not an appellate review. And if we need  
20 to further define that for purposes of this hearing, I  
21 think it's appropriate that it be briefed, in the sense  
22 that ACD needs to present what they are asking for,  
23 specifically, that's different than what was done. And  
24 we should have an opportunity to respond. It appears  
25 that it's fairly easy and simple, but it isn't,

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1 necessarily.

2 MR. JOHNSON: Is there a dispute about it? Does  
3 ACD have any dispute with the way that the Lila II --  
4 sounds like you are familiar with it.

5 MR. BAYER: I don't think the Lila II is going  
6 to be applicable here. It would be -- I think that you  
7 actually have a fantastic administrative record, right  
8 now, and the petition itself, the nature of the petition,  
9 is directed toward the administrative record. And  
10 because of the allegations contained within the petition,  
11 you do have an administrative record that you can look  
12 back and see whether or not the information was contained  
13 within the permit application package. So whatever rule  
14 came out of Lila II I don't think is appropriate for the  
15 proceeding that we are looking at here today.

16 And that's why I really think that if we can  
17 start looking at defining what is the scope of what we're  
18 going to do here, we can determine what is going to be  
19 discovery that's associated with it. You can determine  
20 whatever schedule you want. I think that, realistically,  
21 today is good today for you folks to figure out where you  
22 want to go in all regards.

23 Perhaps I may be anticipating this a little bit  
24 more than perhaps Mr. Allen, but I think narrowing the  
25 scope of where we're heading is appropriate. It's going

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1 to expedite this. It's going make your-all's job much  
2 easier. It's going to make the concept for constant  
3 intervention, it's going to reduce that dramatically.  
4 And ultimately, we're going to get to a point where we  
5 have a hearing. And as I said, we're entitled to a  
6 hearing within 30 days. And as this is developing with  
7 briefs to be written, and motions to be written, and  
8 discovery this, and inspections, we are not going to get  
9 a hearing for a year. I need a hearing.

10 MR. MORRIS: May I respond?

11 CHAIRMAN JOHNSON: Excuse me.

12 Mr. Morris.

13 MR. MORRIS: As I indicated earlier I believe,  
14 we have structured our case to this point, our responses  
15 to the Board's Order, scope of this hearing order, with  
16 the understanding that Lila Canyon governed how these  
17 proceedings would be viewed by the Board. And that, in  
18 turn, in our view, governs the scope of discovery, and  
19 the nature of discovery, and the role that discovery  
20 plays here.

21 If the Board is going to back away from Lila  
22 Canyon, or distinguish this case and apply another  
23 standard other than Lila Canyon, then we need to know  
24 about that, so that we can structure our case accordingly  
25 and go forward.

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1           My understanding coming in here was that Lila  
2 Canyon defined the nature of these hearings. If the  
3 Board decides that that is not necessarily or not  
4 actually the case, then we need to know that. And if a  
5 briefing process will help the Board in that regard,  
6 great. If the Board is prepared to set different ground  
7 rules than Lila Canyon now, we'll be happy to proceed  
8 according to the ground rules that the Board sets. But  
9 we need to know what rules govern this proceeding.

10           BOARD MEMBER JENSEN: May I ask a question, Mr.  
11 Chairman.

12           CHAIRMAN JOHNSON: Go ahead Mr. Jensen.

13           BOARD MEMBER JENSEN: Mr. Morris, in looking at  
14 your Request for Agency Action, it seems to me -- maybe  
15 I'm misinterpreting what you are now saying -- but it  
16 seemed to me you were saying there that it was in the  
17 nature of appellate, because you were talking about all  
18 the things in the record, the lack of, or the  
19 misinterpretation of that information. And now I hear  
20 you talking about Lila II. And as I indicated earlier on  
21 the record, I wasn't here for either of the Lilas. But  
22 my sense of looking at your Request for Agency Action is  
23 that it seems to me that you were looking at it in terms  
24 of -- on an appellate level.

25           MR. MORRIS: I think defining the issues as I

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1 did in the Request for Agency Action works under either  
2 standard. But I understand your point and have to agree  
3 with you that if you are looking at our Request for  
4 Agency Action and saying, Does this fit appellate review?  
5 Yes, it does. I think you can also look at our Request  
6 for Agency Action, ask whether this fits Lila Canyon. I  
7 think it does, too.

8 BOARD MEMBER JENSEN: And what you're asking for  
9 is --

10 CHAIRMAN JOHNSON: Mr. Morris, I keep getting  
11 confused. There was a Lila Canyon I and a Lila Canyon  
12 II. Lila I was an appellate review, and Lila II was de  
13 novo review.

14 MR. MORRIS: That's correct. And when I say  
15 "Lila Canyon," generally I'm talking about Lila Canyon  
16 II, under my understanding that a later ruling by this  
17 Board will be the prevailing rule of law until it's  
18 changed.

19 BOARD MEMBER JENSEN: And what I heard you  
20 saying, Mr. Morris, was, Look, whichever standard you are  
21 going to require, let us know which standard it is so we  
22 can go forward.

23 MR. MORRIS: Exactly right. If these  
24 proceedings are appellate proceedings, we will proceed on  
25 the basis of appellate proceedings, and we'll structure



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1 our discovery with that in mind. And it will be  
2 different discovery than if the rule in Lila Canyon II  
3 prevails. And we have a broader responsibility to  
4 present evidence.

5 CHAIRMAN JOHNSON: We're going to take a short  
6 deliberation. Ask for everyone's forbearance with us.  
7 Our previous deliberations were not on this point. We  
8 will go into the short deliberation room.

9 MR. ALDER: We'll see if we can settle it while  
10 you are out.

11 CHAIRMAN JOHNSON: Okay.

12 (A break was taken from 5:39 p.m. to 7:09 p.m.)

13 CHAIRMAN JOHNSON: Okay. Let's go back on the  
14 record.

15 We'll ask Mike Johnson, the Board attorney, to  
16 discuss what we understand has been some sort of  
17 understanding between the parties.

18 MR. JOHNSON: Based on discussion with counsel  
19 for all the parties -- anybody can correct me if I don't  
20 state this accurately -- but the agreement was that the  
21 parties can file simultaneous briefs on December 29,  
22 addressing the proper scope of review in this matter and  
23 how that impacts the issue of discovery.

24 The Board would also like to see addressed in  
25 those briefs, as a part of the discussion as to what the

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1 proper scope of review is, what should constitute the  
2 record for review in this case, as well. That was the  
3 agreement as I understood it, so. You can weigh in if  
4 you need to.

5 CHAIRMAN JOHNSON: Does anybody want to weigh in  
6 on that?

7 MR. BAYER: I think that's fairly succinct. I  
8 think if we can be as succinct in the manner in which we  
9 give our advice to the Board, we will all go much farther  
10 and much faster.

11 MR. BLOCH: We concur.

12 CHAIRMAN JOHNSON: Mr. Alder?

13 MR. ALDER: Yes, that would be fine.

14 CHAIRMAN JOHNSON: Mr. Bernard?

15 MR. BERNARD: Yes.

16 CHAIRMAN JOHNSON: Okay. Thank you. Then is  
17 there anything else that we need to do today?

18 MR. BERNARD: Yes. Kane County would  
19 respectfully that Commissioner Heaton be allowed to just  
20 make a statement, that's all. It will be brief.

21 CHAIRMAN JOHNSON: I'm not opposed to that, but  
22 I really don't want to open it up so that all parties  
23 need to respond to that statement.

24 MR. ALDER: Mr. Chairman, I would oppose that  
25 statement at this time as being untimely. We are going

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1 to have lots of opportunity for Mr. Heaton to speak.

2 MS. DRAGOO: But he came all the way up here.  
3 He's been waiting all day.

4 CHAIRMAN JOHNSON: Commissioner, do you want to  
5 state something on the record because you don't  
6 anticipate being at any more of the proceedings?

7 COMMISSIONER HEATON: That is the problem.

8 CHAIRMAN JOHNSON: Is that because you are going  
9 out of office?

10 COMMISSIONER HEATON: No. No. It's just  
11 that...

12 CHAIRMAN JOHNSON: Personal commitments that you  
13 won't...

14 COMMISSIONER HEATON: Don't tempt me. No.

15 CHAIRMAN JOHNSON: Okay. Commissioner, I hope  
16 you understand my concern that if we open it up to you to  
17 put a statement on the record -- that you are not an  
18 attorney for Kane County, you are being represented by  
19 your attorney. Attorneys in all -- representing all the  
20 parties have been able to address the Board today -- but  
21 if we open it up now for witnesses to start addressing  
22 the Board on this matter, I'm very concerned about where  
23 that may head today. Do you understand what I'm saying?

24 COMMISSIONER HEATON: So you are saying limit  
25 what I say to -- don't state an opinion. If I have a

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1 fact, go ahead and present the fact.

2 BOARD MEMBER GILL: I can't hear him. I'm  
3 sorry, I don't know what he's saying.

4 COMMISSIONER HEATON: So you are saying, rather  
5 than state an opinion, if I have a fact that is  
6 non-disputable, go ahead and state the fact?

7 CHAIRMAN JOHNSON: If you are going to start  
8 presenting argument to us, I think we are going to be  
9 heading somewhere that the Board doesn't want to head  
10 today.

11 COMMISSIONER HEATON: I understand.

12 CHAIRMAN JOHNSON: I have no idea what the  
13 nature of your statement is.

14 COMMISSIONER HEATON: Let me just tell you,  
15 basically, what it is, and leave out the most  
16 controversial part. I actually just took a canvass of  
17 individuals. There's statement in this -- there's  
18 portion in this that addresses non-support by the  
19 citizenry. I took a canvass --

20 CHAIRMAN JOHNSON: I think we are getting into  
21 the arguments of the case then. I'm not comfortable with  
22 doing that today.

23 COMMISSIONER HEATON: Okay.

24 CHAIRMAN JOHNSON: We would welcome you to come  
25 back when these proceedings continue, or we would welcome

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1 you to submit something in writing or have it presented  
2 through your attorney at a later date. I just hope  
3 understand --

4 COMMISSIONER HEATON: I'll withdraw. I  
5 understand --

6 CHAIRMAN JOHNSON: -- the concern of the Board.

7 COMMISSIONER HEATON: -- we've kept you here a  
8 long time.

9 CHAIRMAN JOHNSON: Okay. I appreciate that,  
10 Commissioner.

11 MR. BAYER: Mr. Chairman, let me ask you this:  
12 Would it be possible that the Board would entertain  
13 discussions right now of setting at least a tentative  
14 timetable for some milestones in this proceeding that we  
15 might try to set, knowing that it might be an ambitious  
16 concept, knowing that it might be changed, but at least  
17 giving us some target dates to aim for?

18 MR. JOHNSON: What do the parties think about  
19 it? The other mechanism that could be used to do that  
20 would be, do a prehearing, sort of a conference  
21 telephonically. I guess I'd be curious to know what the  
22 other parties think. Obviously given you've got these  
23 briefs coming in, it might make a big impact on what  
24 those dates might look like.

25 BOARD MEMBER GILL: Isn't it fair to say that as

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1 soon as the briefs come in, that we intend to make a  
2 quick order and then to have a scheduling conference?

3 CHAIRMAN JOHNSON: Here, Ruland.

4 BOARD MEMBER GILL: It is my understanding of  
5 the Board's general consensus is that after the briefs  
6 come in on the 29th, that we will have an order out very  
7 soon thereafter. And the first item of business would be  
8 this scheduling conference to get those milestones set  
9 out. My understanding of the feeling of the Board, and I  
10 may be wrong, is that we want to move this forward for  
11 everybody's benefit.

12 CHAIRMAN JOHNSON: Let me just ask you this  
13 question, Mr. Bayer: In your mind, when do you think the  
14 merits of this case will be heard?

15 MR. BAYER: That's an interesting question. It  
16 depends a lot upon what the determination of the Board  
17 might be.

18 CHAIRMAN JOHNSON: This is just your opinion.

19 MR. BAYER: I would like to think within 60  
20 days.

21 CHAIRMAN JOHNSON: From today?

22 MR. BAYER: From today.

23 CHAIRMAN JOHNSON: Mr. Morris, what's your  
24 envisioning of when the merits of the case will be heard?

25 MR. MORRIS: We still need to have a site visit.

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1 It won't be as crucial under one outcome of this briefing  
2 as another. But I just -- I don't see it happening  
3 within 60 days of today. We also have other discovery,  
4 beyond the site visit, that we are going to want to  
5 conduct. And I don't think it's going to take a great  
6 deal of time, but I don't think it's going to happen  
7 within 60 -- or can happen within 60 days of today.

8 I would be much more comfortable knowing how the  
9 Board is going to rule after receiving these simultaneous  
10 briefs, and then deciding what kind of discovery is  
11 necessary under the standard that the Board establishes.

12 BOARD MEMBER GILL: What we're trying to do,  
13 just in my view, is we're trying to give you the rules of  
14 the game before you play it. And one of the key steps is  
15 this scope that you're going to be briefing on. With  
16 that, all of us can then move forward. But if you, at  
17 any time -- I believe the that sense of the chairman is,  
18 any time you feel that we haven't given you the rules of  
19 the game before you play it, we'd like to know that. But  
20 also, the rule of the game is we intend to move this  
21 forward. Is that a fair...

22 CHAIRMAN JOHNSON: Yes, that's correct.

23 MR. MORRIS: That's understood from my point of  
24 view.

25 CHAIRMAN JOHNSON: Mr. Alder, did you want to

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1 weigh in on that at all, if you've got some vision of the  
2 time frame?

3 MR. ALDER: I think that the hearing would be  
4 more efficient if we first have an opportunity to have  
5 motions that can address certain of the issues that might  
6 be dismissed or resolved as a matter of law, prior to an  
7 evidentiary hearing. That won't be happen until after  
8 discovery. So I see 90 days to do that, and then  
9 schedule a hearing. It's longer than I know that ACD  
10 wants, but it seems to me that's the quickest it can be  
11 done. That's my personal opinion.

12 I also wanted to ask the chairman if you were  
13 going to address -- because I know when you were talking,  
14 there was some question whether the Board was going to  
15 rule as to whether there was a right to the hearing  
16 within 30 days, and we didn't get to that. That's on the  
17 agenda of...

18 CHAIRMAN JOHNSON: We had not planned to go into  
19 that matter today. I know there's been some confusion on  
20 that issue, which has been raised by ACD, as to whether  
21 the hearing must be held within 30 days, started within  
22 30 days, or completed within 30 days.

23 MR. BAYER: For the record let me state, I think  
24 that the Utah regulation provides that you basically have  
25 to commence the hearing within 30 days. And while we're



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1 not willing to waive that 30-day requirement, I think at  
2 any given point in time this Board might say, We're  
3 starting the hearing at this moment and continuing it for  
4 a future date.

5 MR. ALDER: I guess that's what I think needs to  
6 be on the record.

7 MR. BAYER: And I think that needs to be on the  
8 record.

9 CHAIRMAN JOHNSON: I would be willing to put  
10 that on the record with one provision. And that is, this  
11 a seven-member board. We have one member that is not  
12 here today. And I don't think that we've conducted any  
13 business today -- and that's one of the reasons,  
14 Commissioner, I didn't want to hear what you were going  
15 to say today. I don't think we've conducted any business  
16 today that would preclude that seventh board member from  
17 sitting on the Board when this matter goes forward.

18 So if you are asking us to say that the hearing  
19 has been commenced, I would be willing to say that with  
20 that provision, that all seven board members will be  
21 sitting on the Board when we begin, unless good cause is  
22 shown that someone should be excluded. I don't want that  
23 exclusion to be based on stuff that was presented today.

24 MR. BAYER: That's fine.

25 MR. MORRIS: We concur with that.

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1 CHAIRMAN JOHNSON: Okay.

2 MR. BERNARD: So does Kane County.

3 CHAIRMAN JOHNSON: Thank you.

4 And did you want to weigh in, Mr. Bernard, at  
5 all, on the time frame that you envision?

6 MR. BERNARD: No. I think ACD -- I think the  
7 time frame that's been set forth is proper.

8 CHAIRMAN JOHNSON: Okay.

9 BOARD MEMBER GILL: Move to adjourn.

10 CHAIRMAN JOHNSON: Okay. So briefs will be  
11 filed on the 29th, and then there will be a scheduling  
12 conference.

13 The Board will consider those briefs. And there  
14 will be a scheduling conference as soon after the 29th as  
15 can be scheduled. And the Board does want to move this  
16 matter forward.

17 BOARD MEMBER JENSEN: I was going to say that I  
18 think that the tenure of this Board is to move this  
19 matter along sooner rather than later. And so we would  
20 ask the parties to move this along. And I think if we  
21 feel it's not moving along, we're going to help move it  
22 along.

23 MS. DRAGOO: Good.

24 MR. BAYER: And I would like to thank the Board  
25 for your attention today in putting up with me. And I

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1 very much appreciate the effort you put forward. And I  
2 say it with great sincerity. Thank you all.

3 CHAIRMAN JOHNSON: This Board is definitely  
4 interested in making a good decision and a proper  
5 decision in this matter. So we hope that all the parties  
6 will bear with us when we need to deliberate, or asking  
7 for briefs on things. But we are bound and determined to  
8 make a good decision on this matter. And I know that you  
9 all disagree on what a good decision is.

10 MR. BAYER: Not until I see it.

11 CHAIRMAN JOHNSON: Okay. So if there's nothing  
12 else today, let's stand adjourned. And we appreciate  
13 everyone's time and efforts in this matter. We look  
14 forward to your briefs on the 29th. Thank you.

15 (The proceedings concluded at 7:22 p.m.)  
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